ANTICIPATING WILL CONTESTS AND HOW TO AVOID THEM

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EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Regent and Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2020); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIAN-SHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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ANTICIPATING WILL CONTESTS AND HOW TO AVOID THEM

I. THE FLAGS OF CAUTION — REASONS TO ANTICIPATE A WILL CONTEST

An estate planner must always be on guard when drafting instruments which may supply incentive for someone to contest a will. Anytime an individual would take more through intestacy or under a prior will, the potential for a will contest exists, especially if the estate is large. Although will contests are relatively rare, the prudent attorney must recognize situations which are likely to inspire a will contest and take steps during the drafting stage to reduce the probability of a will contest action and the chances of its success.[1]

A. Disinheritance of Close Family Members in Favor of Distant Relative, Friend, or Charity

A will leaving nothing or only nominal gifts to close family members, such as a spouse of many years or children, is ripe for a contest action, especially if the beneficiaries are distant relatives, social friends, or charities. Juries are prone in close cases to invalidate a will which disinherits the surviving spouse and children, although "[i]t is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testator because they do not believe he made a wise or fair distribution of his property."[2]

Will contests based on property passing outside of the traditional family are likely to increase because of various societal changes. Many older individuals have significant involvement with people outside of the family in retirement communities and senior citizen organizations. The lifestyles of younger people include more divorces, childless marriages, cohabitation, and same-sex relationships. As a result, estate plans of these individuals are more likely to include gifts to non-family members and thus increase the likelihood of contests. One insightful commentator has noted:

> Inheritance has traditionally been an occasion when families reconfirm the importance of kinship ties. The scant evidence from research on will contests shows more than property is at stake when families go to court. Usually there is concern that a traditional aspect of the family — a role, relationship, or the balance of power — has been violated by the terms of the trust or estate plan. Bequests outside the family — to friends, lovers, step-heirs, and so forth — may never become socially acceptable, even if they are increasingly common. These unconventional estate plans mean that family members will be more prone to litigate instead of accepting a decedent's estate plan . . . . [M]ost families are unable — and unwilling — to inherit less so that friends, organizations or lovers can inherit more.[3]

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[1] *See* Jeffrey P. Rosenfeld, *To Heir is Human,* PROB. & PROP., July/Aug. 1990, at 21, 25 (3-4% of probated wills reach the trial stage of a will contest); Jeffrey A. Schoenblum, *Will Contests — An Empirical Study,* 22 REAL PROP. PROB. & TR. J. 607 (1987) (extensive discussion of study done on will contests over a nine year period in Nashville, Tennessee).

[2] Stephen v. Coleman, 533 S.W.2d 444, 445 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (quoting Farmer v. Dodson, 326 S.W.2d 57, 61 (Tex. Civ. App.—Dallas 1959, no writ)).

[3] Jeffrey P. Rosenfeld, *To Heir is Human,* PROB. & PROP., July/Aug. 1990, at 21, 25.

B. Unequal Treatment of Children

A will which treats children unequally, especially if the children receiving disproportionately large amounts have no special needs, is likely to encourage spurned siblings to contest the will. The contestant's appeal to the inherent fairness of all children sharing equally may sway a wavering jury.[4]

C. Sudden or Significant Change in Disposition Plan

When a testator[5] makes a sudden or significant change to the will's dispositive scheme, the beneficiaries of the old will who lose under the new will may be motivated to contest the new will. These beneficiaries will strive to show that the testator lacked capacity to change the will or that the testator was unduly influenced to make the alterations.

D. Imposition of Excessive Restrictions on Bequests

A testator may impose restrictions on gifts to heirs. For example, the will may create a testamentary trust for the children with expenditures limited to certain items (e.g., health care, room and board, and education) or with lump-sum distributions authorized only upon the beneficiary's fulfilling certain criteria (e.g., graduating from college or reaching a certain age). Although the trust may treat all of the testator's children equally, the imposition of restrictions may give the beneficiaries reason to contest the will and, if successful, immediately obtain the estate funds via intestacy without limitations or conditions.

E. Elderly or Disabled Testator

The age, health, mental condition, or physical capacity of a testator may provide unhappy heirs or beneficiaries of prior wills with a basis to claim lack of testamentary capacity or undue influence. Although the mere fact of advanced age, debilitating illness, or severe handicap does not necessarily diminish capacity, these circumstances can play an important role in supporting a will contest.

F. Unusual Behavior of Testator

A peculiar acting testator is apt to give dissatisfied heirs a basis for contesting the will either on the ground that the testator lacked capacity or was suffering from an insane delusion. Despite statements in Texas cases such as, "A man may believe himself to be the supreme ruler of the universe and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions,"[6] a will executed by a person with behavior or beliefs out of the mainstream of society's definition of "normal" is apt to trigger a contest action.

Caveat: This article discusses a wide range of techniques which may be helpful in preventing will contests. These techniques vary widely in both cost and predictability of results. There is no uniform approach to use for all clients. Each case needs to be carefully examined on its own merits before deciding which, if any, of the techniques should be used.

[4] *Cf.* Birk v. First Wichita Nat'l Bank, 352 S.W.2d 781, 783 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.) (while determining the enforceability of a conveyance of a beneficiary's expectancy, the court stated, "We think it is neither unreasonable nor unusual for children to agree to share equally in their parent's estate, even where some know or believe they would receive more than an equal share in a testamentary disposition.").

[5] Unless the context otherwise requires, the term "testator" is used in a non-sex specific manner. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1219 (1987) (defining "testator" as "*a person* who dies leaving a will" (emphasis added)).

[6] Gulf Oil Corp. v. Walker, 288 S.W.2d 173, 180 (Tex. Civ. App.—Beaumont 1956, no writ) (quoting Fraser v. Jennison, 42 Mich. 206, 3 N.W. 882, 900 (1879)).

II. INCLUDE *IN TERROREM* PROVISION

A *no-contest provision,* also called an *in terrorem* or *forfeiture* clause, provides that a beneficiary who contests the will loses at least some, and typically all, of the benefits given under the will.[7] In terrorem provisions are one of the most frequently used contest prevention techniques. This widespread use is due to the technique's low cost (a few extra lines in the will), low risk (no penalty incurred if the clause is declared unenforceable), and the potential for effectuating the testator's intent (property passing via the will rather than through intestacy or under a prior will).[8]

Below is a simple no-contest provision:

> If any beneficiary under this will [or the trust created herein] contests or challenges this will [or trust] or any of its [their] provisions in any manner, be it directly or indirectly (including the filing of a will contest action), all benefits given to the contesting or challenging beneficiary are revoked and those benefits pass under the terms of this will as if the contesting beneficiary predeceased me without descendants.

Most jurisdictions uphold forfeiture provisions although several deem them invalid. Even if in terrorem provisions are valid and enforceable, they are unpopular with the courts and are strictly construed.[9] Courts avoid forfeiture unless the beneficiary's conduct comes squarely within the conduct the testator prohibited in the will. Courts frequently treat the beneficiary's suit as one to construe or interpret the will, rather than as one to contest the will, to avoid triggering a forfeiture.

No-contest provisions are often justified on the basis that "they allow the intent of the testator to be given full effect and avoid vexatious litigation, often among members of the same family. Such contests often result in considerable waste of the estates and hard feelings that can never be repaired."[10] On the other hand, the enforcement of an in terrorem provision may be against public policy under certain circumstances. For example, a no-contest provision would be a powerful tool in the hands of a person who fraudulently or through undue influence procured the execution of a will naming the person as one of the beneficiaries of the estate. The clause may give the evil-doer an increased chance of success by terrorizing potential contestants who are also given substantial benefits under the will.

Many jurisdictions such as Tennessee[11] have cases or statutes limiting the scope of in terrorem provisions so that forfeiture does not occur if the beneficiary has probable cause to contest the will.[12] On the other hand, some states such as

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[7] In early English law, these terms were not used interchangeably. An in terrorem clause was considered to be an empty threat; that is, the beneficiary still received the gift even if the beneficiary contested the will and lost. A true no-contest or forfeiture clause went beyond a mere threat and actually delivered the punishment; that is, the unsuccessful contesting beneficiary sacrificed the gift under the will. In modern practice, the terms are synonymous.

[8] *See generally* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 408-10 (2d ed. 1953); 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 44.29 (1962); WILLIAM M. MCGOVERN, JR., ET AL., WILLS, TRUSTS AND ESTATES 585-88 (1988); W. Harry Jack, *No-Contest or In Terrorem Clauses in Wills — Construction and Enforcement*, 19 SW. L.J. 722 (1965); Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary,* 23 A.L.R.4th 369 (1983); 74 TEX. JUR. 3d *Wills* § 255 (1990).

[9] Hurley v. Blankenship, 267 S.W.2d 99, 100 (Ky.1954).

[10] Gunter v. Pogue, 672 S.W.2d 840, 842-843 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

[11] Tate v. Camp, 245 S.W. 839, 842 (Tenn. 1922); Winningham v. Winningham, 966 S.W. 2d 48 (Tenn. 1998).

[12] See ALASKA STAT. § 13.16.555; UNIF. PROB. CODE §§ 2-517 & 3-905.

Arkansas indicate that"[t]here is no good-faith exception to a direct attack on a will that contains a no-contest clause."[13]

Courts that support the good faith/probable cause exception do so on several grounds. First, the testator would not have intended to preclude a contest under such circumstances; and second, enforcing the clause would be contrary to public policy if the beneficiary had a legitimate basis for bringing the contest. Nonetheless, a few courts hold that a general condition against contest is enforceable regardless of the contestant's good faith or the existence of probable cause.

For a no-contest provision to deter a will contest effectively, it must be carefully drafted to place the disgruntled beneficiary at significant risk. If a testator leaves nothing or only a relatively small amount to the heir he or she wishes to disinherit, a no-contest provision will have little impact because the heir gains tremendously if the will is invalid and loses little if the will and accompanying no-contest provision are upheld. Assume that an heir would receive $100,000 under intestacy and $5,000 in the will. The heir is likely to risk a sure $5,000 for a potential $100,000. However, if the testator leaves the heir a substantial sum, e.g., $50,000, the heir will hesitate to forfeit a guaranteed $50,000 for fear of taking nothing if the will is upheld, even though the heir would receive a $100,000 intestate share if the will is invalidated. And, of course, the heir would not really receive $100,000 because most attorneys take will contest cases on a contingency basis so the heir is likely to net only about $65,000. Most people in the heir's position would think long and hard before risking $50,000 for $65,000.

The in terrorem clause should indicate the conduct triggering forfeiture. Does the testator wish to prevent only a will contest or is the testator's intent to prohibit a broader range of conduct? Does forfeiture occur upon the filing of a contest action or must actual judicial proceedings first occur? Is an indirect attack (e.g., where a beneficiary assists another person's contest) punishable the same as a direct attack? Will a contest by one beneficiary cause other beneficiaries to forfeit their gifts (e.g., five beneficiaries/heirs are left a significant sum but less than intestacy, one of them agrees to take the risk of contest because the other four secretly agree to make up the loss if the contest fails)? Will a beneficiary's challenge to the appointment of the designated executor trigger forfeiture?

The testator should name an alternate recipient of the property that is subject to forfeiture under a no-contest provision. This provides someone with a strong interest in upholding the will and the forfeiture provision. This contingent beneficiary, especially if it is a large charity able to elicit the support of the state's attorney general, may be able to place significant resources into fighting the contest. In addition, the law of some states requires a gift over for an enforceable no-contest provision.

Although the enforceability of an in terrorem provision that provides that it operates despite the contestant's good faith and probable cause may be uncertain under local law, the clause should contain an express statement of the testator's intent in this regard. The beneficiaries and the court will then have better evidence of the testator's intent, and the court can focus on the clause's legal effect rather than on a determination of the testator's wishes. Note that Tennessee does not permit the testator to eliminate the good faith/probable cause exception.[14]

III. EXPLAIN REASONS FOR DISPOSITION

An explanation in the will of the reasons motivating particular dispositions may reduce will contests. For example, a parent could

[13] Sharp v. Sharp, 447 S.W.3d 622 (Ark. Ct. App. 2014).

[14] "[A] testator cannot eliminate the good faith and reasonable justification exception even by specific language." *Winningham v. Winningham*, 966 S.W. 2d 48 (Tenn. 1998).

indicate that a larger portion of the estate is being left to a certain child because that child is mentally challenged, requires expensive medical care, supports many children, or is still in school. If the testator makes a large charitable donation, the reasons for benefiting that particular charity may be set forth along with an explanation that family members have sufficient assets of their own. The effectiveness of this technique is based on the assumption that disgruntled heirs are less likely to contest if they realize the reasons for receiving less than their fair (intestate) share.

It is possible, however, for this technique to backfire. The explanation may upset some heirs, especially if they disagree with the facts or reasons given, and thus spur them to contest the will. Likewise, the explanation may provide the heirs with material to bolster claims of lack of capacity or undue influence. For example, assume that the testator's will states that one child is receiving a greater share of the estate because that child frequently visited the aging parent. Another child may use this statement as evidence that the visiting child unduly influenced the parent. If the explanation is factually incorrect, heirs may contest on grounds ranging from insane delusion to mistake or assert that the will was conditioned on the truth of the stated facts.[15]

The language used to explain reasons for a disposition must be carefully drafted to avoid encouraging a will contest or creating testamentary libel. An alternative approach is to provide explanations in a separate document which could be produced in court if needed to defend a will contest, but which would not otherwise be made public.[16]

[15] *See generally* Steve R. Akers, *Anatomy of a Texas Will and Effective Will Drafting,* in STATE BAR OF TEXAS, WILL DRAFTING D-104 (1989).

[16] *See infra* § X, page 24.

IV. AVOID BITTER OR HATEFUL LANGUAGE

A. Encourages Will Contests

If the drafter decides it is advisable to explain the reasons for a particular dispositive scheme, care must be exercised to ensure the explanation does not have the opposite result, i.e., provoking a contest action attributable solely to the will's language. Any explanation of gifts or descriptions of heirs should be even-handed, free of bitterness or spite, and factually correct. An heir who feels slighted both emotionally and monetarily may be more likely to contest than one who is hurt only financially.

B. Potential for Testamentary Libel

"To my grandson . . . I give . . . Ten Dollars . . . I have already given my said grandson the sum of One Thousand Dollars . . . which he squandered. This provision . . . expresses the regard in which I hold my said grandson, who deserted his mother and myself by taking sides against me in a lawsuit, and because he is a slacker, having shirked his duty in World War II."[17]

Testamentary libel may become an issue when a will containing libelous statements is probated and thereby published in the public records. Typically, such situations arise when testators explain their reasons for making, or not making, particular gifts. The question is then presented whether the defamed individuals are entitled to recover from the testator's estate or the executor.

Courts addressing the issue of testamentary libel have reached varying conclusions. Some courts simply delete the offensive material from the probated will, while others hold the estate liable for the damages caused by the libelous material. Other courts, however, rule that there is no cause of action for testamentary libel because statements relating to judicial proceedings are

[17] Kleinschmidt v. Mattheiu, 266 P.2d 686, 687 (Or. 1954).

privileged or because actions for personal injuries against the testator died along with the testator.[18]

V. USE HOLOGRAPHIC WILL

Wills entirely in the testator's own handwriting appear to have an aura of validity because they show the testator was sufficiently competent to choose his or her own words explaining intent and to write them down without outside assistance. The attorney may use this somewhat liberal tendency toward holographic wills to good advantage if the attorney anticipates a will contest. Before executing a detailed attested will, the testator could hand write a will which, although not as comprehensive as the formal will, contains a disposition plan preferred to intestacy. If the attested will was invalidated, the holographic will could serve as an unrevoked prior will.[19]

VI. ENHANCE TRADITIONAL WILL EXECUTION CEREMONY[20]

One of the most crucial stages of a client's estate plan is the will execution ceremony—the point at which the client memorializes his or her desires regarding at-death distribution of property. Unfortunately, attorneys may handle this key event in a casual or sloppy fashion. There are even reports of attorneys mailing or hand-delivering unsigned wills to clients along with will execution instructions.[21] Some attorneys allow law clerks or paralegals to supervise a will execution ceremony.[22] This practice is questionable not only because it raises the likelihood of error, but also because the delegation of responsibility may violate the rules of professional conduct proscribing the aiding of a non-lawyer in the practice of law. An unprofessional or unsupervised ceremony may provide the necessary ammunition for a will contestant successfully to challenge a will.

Since the earliest recognition of the power of testation, some type of ceremony has accompanied the exercise of that power. Will ceremonies help demonstrate that the testator was not acting in a casual, haphazard, whimsical, or capricious manner by furnishing proof that the testator deliberated about testamentary desires and had a fixed purpose in mind when making the will. The ceremonies also provide evidence that the will was actually made by the testator, by impressing the act on the minds of witnesses.

A proper ceremony, coupled with sensitive and tactful counseling by the attorney during the entire estate planning process, may make it easier for clients to cope with the inevitability of death. Unfortunately, attorneys have been accused of showing "little concern about the therapeutic counseling that goes on in an 'estate planning' client's experience."[23] You need to remember that many clients make only one will during the client's entire life and that the psychological effects of confronting death are strong. Even if you conduct scores of will ceremonies each year, you must not lose sight of the client's emotions and the psychological benefits that may be obtained through client interviews and will ceremonies.

One commentator has somewhat humorously summarized the psychological benefits of the ceremony as follows:

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[18] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113 at 770-71 (4th ed. 1971); 80 AM. JR. 2d *Wills* § 873 (1975); Leona M. Hudak, *The Sleeping Tort: Testamentary Libel,* 12 CAL. W.L. REV. 491 (1976); A.L. Schwartz, Annotation, *Libel by Will*, 21 A.L.R.3d 754 (1968).

[19] Arkansas recognizes handwritten wills without witnesses. ARK STAT. § 28-25-104.

[20] Portions of this section are adapted from Gerry W. Beyer, *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011).

[21] See *Hamlin v. Bryant*, 399 S.W.2d 572, 575 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).

[22] *Palmer v. Unauthorized Practice Comm. of the State Bar*, 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ).

[23] Thomas Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death,* 55 IOWA L. REV. 376, 376 (1969).

> When a client comes in to do something about his estate planning problem, he wants a lot of things. He wants solace because he is thinking about the day when he will not be here. He wants approval of what he has done and what he proposes to do. And he wants something else he almost never gets—a ceremony. Now, life offers very few opportunities for high ceremony. Birth is not a very good time. It is too laborious. Marriage is handled in rather a spectacular style. Nobody has been able to do much with divorce on the ceremonial side. For death, there is a ceremony, but it is hard for a decedent to be there to enjoy it. He is the principal.
>
> The estate planning process . . . ought to be a high ceremonial occasion because a client should be getting great intangible satisfactions about these significant decisions that he has made that were embodied in the instruments he leaves behind.[24]

Caveat: The format below is based on Texas law. However, you should be able to conform it to the requirements of your state.

A. Prior to the Ceremony

1. Proofread Will

Before the client arrives for the will execution ceremony, the attorney should carefully proofread the will for errors such as misspellings, omissions, erasures, and overstrikes. To reduce the number of inadvertent errors, it is advisable for another attorney to review the will. The attorney should carefully correct all errors and print a new original. The attorney should not use interlineations, mark-outs, erasures, or correction fluids.

2. Assure Internal Integration of Will

The attorney should inspect the will to ensure that all pages are printed or typed on the same kind of paper, that all pages are the same size, that the font types and sizes are consistent throughout the will, that each page is numbered *ex toto* (e.g., page 4 of 10), and that there are no excessive blank spaces.

The attorney needs to securely fasten the pages of the will together, but it is a good idea to wait until after the client reviews the will to facilitate any last minute changes or corrections. If the pages of the will are stapled, the attorney should not remove the staples; multiple staple holes may be evidence of improper page substitution.[25]

3. Review Will with Client

The attorney should review the final draft of the will with the client to confirm that the client understands the will and that it comports with the client's intent. The client should have adequate time to read the will, to ascertain that corrections to prior drafts have been made, and to determine that no unauthorized provisions have inadvertently crept into the will.

Some attorneys now add "errors" into draft wills to make certain their clients actually read them, sometimes providing a "reward" in the form of a gift card at a local store for finding the mistakes.

4. Explain Ceremony to Client

The attorney should explain the mechanics of the will execution ceremony to the testator in language the testator understands. The attorney should avoid legalese because the client may be too embarrassed to admit a lack of understanding. It is helpful for the client to know how the ceremony will proceed and what is expected, e.g., to answer certain questions.

[24] *Estate Planning for Human Beings,* 3 U. MIAMI INST. ON EST. PLAN. § 69.1902 (P. Heckerling ed. 1969) (statement of Dean Willard H. Pedrick, panelist).

[25] See *Mahan v. Dovers*, 730 S.W.2d 467, 469–70 (Tex. App.—Fort Worth 1987, no writ).

B. The Ceremony

1. Select Appropriate Location

The will execution ceremony should take place in pleasant surroundings. A conference room works well, as does a large office with appropriate tables and chairs. The client should be comfortable and at ease during the ceremony. A relaxed client is more likely to present a better image to the witnesses.

2. Avoid Interruptions

The ceremony should be free of interruptions. Thus, secretaries should hold all telephone calls and be instructed not to interfere with the ceremony. Once the ceremony begins, no one should enter or leave the room until the ceremony is completed. Interruptions disrupt the flow of the ceremony and may cause the supervising attorney to inadvertently omit a key element.

3. Gather Participants

The testator, two or three disinterested witnesses, a notary, and the supervising attorney should gather at the appropriate location. As a precaution against claims of overreaching and undue influence, no one else should be present under normal circumstances.

4. Seat Participants Strategically

The participants need to be seated so each can easily observe and hear the others. The attorney should be conveniently located near the participants to make certain the proper pages are signed in the correct places. If an oblong table is available, an effective seating arrangement is to have the attorney at one end with the notary at the other end and with the testator on one side facing the two witnesses on the other side.

5. Make General Introductions

The attorney should introduce all participants. Although it may be advisable to use witnesses already known to the client, it is a common practice for attorneys to recruit anyone who is around (e.g., secretary, law clerk, delivery person) to serve as the witnesses. Accordingly, it is important to impress the identity of the testator on the witnesses so that they witness will be able to remember the ceremony should their testimony later be needed.

6. Explain Ceremony

The attorney should explain the importance of the will execution ceremony and inform the client that the ceremony is about to commence. Although Texas law does not require publication for a valid will, it is useful for the witnesses to know the type of document being witnessed.[26] In addition, publication is required for the self-proving affidavit in which the witnesses swear that the testator said the instrument is his or her last will and testament.

7. Establish Testamentary Capacity

If the attorney anticipates a will contest, it is especially important to establish each element of testamentary capacity during the ceremony. The attorney and the testator should engage in a discussion designed to cover the elements of testamentary capacity as found in Texas cases such as *Prather v. McClelland*.[27] For example, the attorney should demonstrate that the testator knows the testator is executing a document disposing of the testator's property upon death, that the testator knows the general nature and extent of the testator's property and the natural objects of the testator's bounty, and that the testator is able to appreciate these things at the same time so as to make reasonable judgments.

8. Establish Testamentary Intent

Questions substantially in the following form should be directed to the testator to demonstrate testamentary intent.

- [Testator's name], is this your will?
- Have you carefully read this will and do you understand it?

[26] See *Davis v. Davis*, 45 S.W.2d 240, 241 (Tex. Civ. App.—Beaumont 1931, no writ).

[27] 13 S.W. 543, 546 (Tex. 1890).

- Do you wish to make any additions, deletions, corrections, or other changes to your will?
- Does this will dispose of your property at your death in accordance with your desires?
- Do you request [witnesses' names] to witness the execution of your will?

9. Execution and Self-Proving Affidavit

a. One-Step

If the self-proving affidavit is included as part of the will, the attorney and notary should take the following steps:

- The attorney explains the purpose and effect of a self-proving affidavit, i.e., to make probate easier and more efficient by allowing the will to be admitted without the testimony of witnesses.
- The notary takes the oath of the testator and witnesses.[28]
- The notary asks the testator to answer the following questions which are modeled after the statutory form in Texas Estates Code § 251.1045. When the testator answers these questions, it impresses the ceremony on the witnesses better than if the testator is merely asked to read and sign the affidavit. The testator should answer "yes" to each question.
  - [Testator], is this document your will?
  - Do you willingly make and execute your will in the presence of [witness one] and [witness two] all of whom are present at the same time?
  - Do you do so as your free act and deed?
  - Do you request [witness one] and [witness two] to sign this will in your presence and in the presence of each other?
- Testator initials each page of the will, except the last page, at the bottom or in the margin to reduce later claims of page substitution.
- The testator signs and dates the will.
- The notary asks the witnesses to answer the following questions which are modeled after the statutory form in Texas Estates Code § 251.1045. When the witnesses answer these questions, it impresses the ceremony on the witnesses better than if each witness is merely asked to read and sign the affidavit. The witnesses should answer "yes" to each question.
  - Did [Testator] declare to you that this instrument is [testator's] will?
  - Did [Testator] request that you act as a witness to [testator's] will and signature?
  - Did [Testator] sign this will in your presence and in the presence of the other witness?
  - Is [Testator] eighteen years of age or over? [Or, if the testator is under age eighteen, Is [Testator] married, or been lawfully married, or is a member of the armed forces of the United States or an auxiliary thereof or of the Maritime Service?]
  - Do you believe that [Testator] is of sound mind?
- Each witness initials every page, except the last page, at the bottom or in the margin. This helps reduce claims of page substitution.

[28] See Broach v. Bradley, 800 S.W.2d 677, 678 (Tex. App.—Eastland 1990, writ denied) (holding a self-proving affidavit invalid because the notary had not properly sworn the witnesses).

- The witnesses sign and date the will in the testator's presence and in the presence of each other.
- The notary signs the affidavit and affixes the appropriate seal or stamp.
- The notary records the ceremony in the notary's record book.[29]

b. Two-Step

The following procedure should be used if the will and self-proving affidavit are separate documents.

(1) Conduct Will Execution

The testator's attorney should take the following steps when the testator executes the will:

- Testator initials each page of the will, except the last page, at the bottom or in the margin to reduce later claims of page substitution.
- Testator completes the testimonium clause by filling in the date and location of the ceremony.
- Testator signs the will at the end. The testator should sign as the testator usually does when executing legal documents to prevent a contest based on forgery.
- The attorney should pay close attention to make certain everything is written in the proper locations.
- Although not a necessary element of a valid will under Texas law, the witnesses should watch the testator sign the will so that they may testify to the signing.

(2) Conduct Witness Attestation

- Each witness initials every page, except the page with the attestation clause, at the bottom or in the margin. This helps reduce claims of page substitution.
- One of the witnesses dates the attestation clause to provide additional evidence of when the execution occurred.
- Each witness signs the attestation clause and writes his or her address. Having this information on the will may be helpful should it later become necessary to locate the witnesses.
- The attorney watches carefully to make certain everything is written in the proper locations.
- The testator observes the witnesses signing the will. Although the testator is not required to see the witnesses sign, the attestation must take place in the testator's presence. The term "presence" has been defined as a conscious presence—"the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance."[30]
- The witnesses observe each other signing. Although this is not required under Texas law, the witnesses will provide better testimony concerning the ceremony if they observe each other signing the will.

(3) Completion of Self-Proving Affidavit

- The attorney explains the purpose and effect of a self-proving affidavit, i.e., to

[29] TEX. GOV'T CODE § 406.014.

[30] *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.). See also *Morris v. Estate of West*, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (deeming that the attestation took place outside of testator's presence because the testator could not have seen the witnesses sign without walking four feet to the office door and fourteen feet down a hallway).

make probate easier and more efficient by allowing the will to be admitted without the testimony of witnesses.

- The notary swears the testator and witnesses.
- The notary asks the testator to answer the following questions which are modeled after the statutory form in Estates Code § 251.104. When the testator answers these questions, it impresses the ceremony on the witnesses better than if the testator is merely asked to read and sign the affidavit. The testator should answer "yes" to each question.
  - [Testator], is this document your last will and testament?
  - Have you willingly made and executed your will?
  - Did you do so as your free act and deed?
- The notary asks the witnesses to answer the following questions which are modeled after the statutory form in Estates Code § 251.104. When the witnesses answer these questions, it impresses the ceremony on the witnesses better than if each witness is merely asked to read and sign the affidavit. The witnesses should answer "yes" to each question.
  - Did [testator] declare to you that this is his/her last will and testament?
  - Did [testator] execute this document as his/her last will and testament?
  - Did [testator] want [witnesses] to sign it as witnesses?
  - Did you sign the will as a witness?
  - Did you sign the will in [testator's] presence?
  - Did you sign the will at the request of [testator]?
  - Was [testator] at the time of will execution eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service)?
  - Was [testator] of sound mind?
  - Are you at least fourteen years of age?
- The notary signs the affidavit and affixes the appropriate seal or stamp.
- The notary records the ceremony in the notary's record book.

10. Conclude Ceremony

The attorney should indicate that the will execution ceremony is now completed. If other estate planning documents, such as a directive to physician, self-declaration of guardian, or durable power of attorney, are needed in the estate plan, it is convenient to execute them at the same time because these documents often require witnesses or self-proving affidavits.

C. After the Ceremony

1. Confirm Testator's Intent

The attorney should talk with the testator to confirm that the testator understood what just happened and that the testator does not have second thoughts about the disposition plan.

2. Make Copies of Will

The attorney should retain a photocopy of the executed will so that the attorney may review it on a periodic basis to determine whether revisions are needed due to a change in the law or testator's circumstances. In addition, the copy of the executed will is useful evidence of the will's contents if the original cannot be produced after

death, and there is sufficient evidence to overcome the presumption of revocation.[31]

3. Discuss Safekeeping of Original Will

Determining the proper custodian of the original will is a difficult task and an anticipated contest makes it even more difficult. It is important to store the original will in a secure location where it may be readily found after the testator's death. Thus, some testators elect to keep the will at home or in a safe deposit box, and others prefer for the attorney to retain the will. In the normal situation, an attorney should refrain from suggesting to retain the original will because the original is then less accessible to the testator. Consequently, the testator may feel pressured to hire the attorney to change the will and the executor or beneficiaries may feel compelled to hire the attorney to probate the will. Some courts in other jurisdictions hold that an attorney may retain the original will only "upon specific unsolicited request of the client."[32] If a will contest is likely, however, it may be dangerous to permit the client to retain the will because the will then stands a greater chance of being located and destroyed or altered by the heirs. An attorney may need to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but yet a location where the will may be found and probated, while taking care not to urge that the attorney act as the will's sanctuary. The executor named in the will, especially if the executor is a non-family member/non-beneficiary or a corporate fiduciary, may be able to provide such a safe haven for the will.

4. Destroy or Preserve Prior Will

When a new will is executed, it is common practice to physically destroy prior wills. If the testator's capacity is in doubt, however, and the testator indicates a preference for the prior will as compared to intestacy, it is a good idea to retain the prior will. If a court holds that the new will is invalid, the attorney may offer the old will for probate much to the chagrin of the contestant.

5. Provide Testator with Post-Will Instructions

The attorney should provide the testator with a list of post-will instructions containing at least the following:

- Discussion of the need to reconsider the will should the testator's life or circumstances change due, for example, to births or adoptions, deaths, divorces, marriages, change in feelings toward beneficiaries and heirs, significant changes in size or composition of estate, or change in state of domicile.
- Explanation that mark-outs, interlineations, and other informal changes are usually insufficient to change the will.[33]
- Instructions regarding safekeeping of the original will.
- Statement that the will must be reviewed if relevant state or federal tax laws change.

VII. MEMORIALIZE WILL EXECUTION CEREMONY ON VIDEO

Modern video-recording technology provides an inexpensive, convenient, and reliable type of "will insurance" which preserves evidence of the will execution ceremony and its important components, such as the condition and appearance of the testator and the presence of witnesses, along with an accurate reproduction of the exact document which was signed.[34]

[31] See *Mingo v. Mingo*, 507 S.W.2d 310, 311 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (holding that an unlocated will is presumed revoked if it was last seen in the testator's possession).

[32] *State v. Gulbankian*, 196 N.W.2d 733, 736 (Wis. 1972).

[33] See *Leatherwood v. Stephens*, 24 S.W.2d 819, 823 (Tex. Comm'n App. 1930, judgment adopted).

[34] For further information about videotaping the will execution ceremony, see Gerry W. Beyer, *Videotaping the Will Execution Ceremony — Preventing Frustration of the Testator's Final Wishes*,

Although video-recording the will execution ceremony is not common practice, the potential of this technique must not be overlooked. This section begins by detailing the possible uses of a video-recording of the will execution ceremony and the status of the law with regard to the video's admissibility into evidence. The advantages and disadvantages of preparing such a video-recording are examined, followed by a discussion of the video-recorded ceremony itself which includes the major elements needed to fully utilize the advantages of this innovative technique.

A. Uses of Will Execution Video-recording

A meticulously prepared video, recording both the visual and audio aspects of the will execution ceremony, may prove indispensable should a will contest arise. This procedure provides the testator with greater assurance that upon the testator's death the will shall take effect and operate as anticipated. Moreover, the video-recording eases the court's task of determining whether the requirements for a valid will were satisfied.

1. Establishes Testamentary Capacity

The testator may answer questions on the video designed to clearly and convincingly demonstrate each element of testamentary capacity. Below are some examples.

- The testator must understand that the testator is executing a will. The testator's statements in front of a video camera regarding the nature of the act about to be performed provides strong evidence of such an understanding.
- The testator must also understand the effect of making a will. The testator's recorded explanation that the testator is making a will to provide for the distribution of the testator's property upon death would demonstrate this requirement.
- The testator must comprehend the general nature and extent of the testator's property. The video-recording can show the testator describing the testator's property and estimating its value.
- The testator must realize who is entitled to the testator's property should the testator die without a will. The testator can discuss the details of the testator's family situation on the video thereby avoiding claims that the testator was unaware of the natural objects of the testator's bounty.
- The testator must be able to appreciate simultaneously what the testator is doing, the testator's property, and the testator's family situation so the testator may form a coherent plan for the distribution of the testator's estate. A video of the testator discussing the testator's will, explaining the testator's situation, and executing the will would tend to prove this important element.

2. Shows Due Execution of Will

A video-recording of the will execution ceremony provides proof that all of the technical requirements for a valid will were satisfied. The video can show the testator declaring the document to be the testator's will and affixing the testator's signature, and the witnesses observing the will execution and thereafter signing in the conscious presence of the testator.

3. Demonstrates Testamentary Intent

The document which allegedly constitutes the testator's will fails unless it can be demonstrated

15 ST. MARY'S L.J. 1 (1983); Gerry W. Beyer, *Video Requiem: Thy Will be Done*, TR. & EST., July 1985, at 24; Gerry W. Beyer, *Videotaping the Will Execution Ceremony*, Est. Plan. Stud., Oct. 1989, at 1 from which portions of this section are adapted; Gerry W. Beyer & William R. Buckley, *Videotape and the Probate Process: The Nexus Grows*, 42 OKLA L. REV. 43 (1989); William R. Buckley & Alfred W. Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271 (1984); Jodi G. Nash, *A Videowill: Safe and Sure*, A.B.A. J., Oct. 1984, at 87.

that it is the very instrument by which the testator intended to make a posthumous disposition of the testator's property. The video-recording of the will execution ceremony would show both the testator and the will itself. Thus, the video would provide theoretically irrebuttable evidence that the document claimed to be the testator's will was the same document executed during the ceremony.

4. Shows Contents of Will

In many situations, it may be difficult to determine the contents of a written will. For example, the testator may have inadvertently lost or destroyed the original will or have hidden it so well that the survivors are unable to locate it. Even if the actual will is produced at probate, portions of it may be missing, erased, or illegible. A video provides excellent evidence of the will's contents by showing the testator reading the entire will aloud and by reproducing the will itself on video so it may be read. The recording may also include close-ups of the testator and witnesses initialing each page of the will so that claims of page substitution may be rebutted.

5. Establishes Lack of Undue Influence or Fraud

The video-recording affords the testator with the opportunity to explain that the will is voluntarily made as an act of free will and not as a result of undue influence or fraud. This is particularly important where an unusual disposition is made, such as the disinheritance of a spouse or child.

6. Assists in Will Interpretation and Construction

Statements made by the testator contemporaneous with the will execution could prove very helpful in determining the correct interpretation and construction of various provisions of the will. By explaining what the testator means by certain words and phrases, the testator can preserve evidence of the testator's intent which would prove invaluable should a dispute later arise.

B. Admissibility of Will Execution Video-recording

1. In General

The admissibility of a video-recording depends generally on the following considerations: (1) relevance; (2) fairness and accuracy; (3) the exercise of judicial discretion as to whether the probative value of the recording outweighs the prejudice or possible confusion it may cause; and (4) other evidentiary considerations such as the presence of hearsay.[35] A video of the will execution ceremony may easily be admitted under these standards. A video is not subject to the vagaries of a witness' fading memory, and it presents a more comprehensive and accurate view of the testator and the testator's condition at the time of will execution than does a piecemeal tendering into evidence of witnesses' testimony.

Although jurisdictions differ and courts do not always enumerate a complete list of foundation elements, there is basic agreement that seven elements must be established before a video-recording may be admitted into evidence.[36] Not all judges insist that the party wishing to use a video of the will execution ceremony satisfy each of these elements, but most courts require a showing of unaltered recording, visual and audio clarity, and sufficient identification of the speakers. The key factor in determining admissibility appears to be that the video is a true and accurate representation of the events portrayed.

The elements of a proper predicate are as follows:

a. Proper Functioning of Equipment

The proponent of the video must show that the recording equipment and the recording

[35] *See generally* 3 CHARLES E. SCOTT, PHOTOGRAPHIC EVIDENCE § 1294 (2d ed. 1969 & Supp. 1994).

[36] *See, e.g.,* Allen v. State, 247 S.E.2d 540, 541 (Ga. Ct. App. 1978); Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980); State v. Hewett, 545 P.2d 1201, 1204 n.4 (Wash. 1976).

medium (tape, DVD, memory chip, hard drive, etc.) were in proper working order at the time of the recording so that both audio and visual events were accurately recorded. The operator of the equipment is the most likely individual to provide this testimony.

b. Equipment Operator Competency

The operator of the recording equipment must be competent. It is not necessary to show that the operator was an expert provided the operator had sufficient skill to run the equipment properly.

c. Accuracy of Recording

It must also be established that the recording truly and correctly depicts the events and persons shown. The video portion should be properly focused and the audio portion should be sufficiently loud and clear so that it is understandable and not misleading.

d. Proper Preservation of Recording

The video must have been appropriately preserved. A detailed record of the chain of custody of the recording is often helpful.

e. Lack of Alteration

A showing must be made that the recording has not been altered; no changes, additions, or deletions are allowed. The testimony of someone present during the recording may be used to establish this element as well as the testimony of an expert who has physically and electronically inspected the media for tampering.

f. Accurate Identification of Participants

The recorded individuals need to be accurately identified. This should be an easy task because both visual and audio clues are available. Although an extremely competent actor could deceive audio and visual senses, individuals familiar with the parties should be able to spot an impostor.

g. Tape Voluntarily Made

It must also be shown that the recording was voluntarily made without improper inducement. The fact that a testator video-recorded the execution of the testator's will is usually indicative of the voluntary nature of the recording. The recording may portray the entire setting dispelling claims that the recording was made involuntarily. Of course, someone out of camera range could threaten the testator with a gun, hold the testator's family hostage, or threaten to withhold food and medicine.

2. Via Court Decision

a. United States Generally

Despite the increasing availability and popularity of video-recording the will execution ceremony, there are only a few reported cases discussing the use of video in probate actions. The earliest case located was a 1979 Florida case.[37] In affirming the trial court's decision that the appellee had not exercised undue influence over the testator, this court merely mentioned that the record in the case showed that the testator's attorney had arranged for the videotaping of the will execution ceremony. The court did not specifically discuss the contents of the videotape. In a 1984 Alabama case, the court discussed how the testator explored the possibility of having his will videotaped but was advised by his attorney to undergo a psychiatric examination instead.[38] In an unreported case, an Ohio court indicated that an attorney was not responsible for will contest litigation costs for failing to videotape the will execution ceremony.[39] In a 1990 Kansas case, the court mentioned that there was evidence that the will execution ceremony had been taped but that the tape was probably destroyed by the attorney's "overzealous" brother-in-law after both the drafting attorney and the testator had died.[40]

[37] Estate of Robertson v. Gallagher, 372 So. 2d 1138, 1140-42 (Fla. Dist. Ct. App. 1979).

[38] Wall v. Hodges, 465 So. 2d 359, 661 (Ala. 1984).

[39] *In re* Estate of Nibert, 1988 WL 102420 (Ohio App.).

[40] *In re* Estate of Raney, 799 P.2d 986, 989-90 (Kan. 1990).

Four cases from the late 1980s directly involve videotapes of the will execution ceremony. In each of these cases, the videotape was carefully examined by the court and then used as evidence to determine the testator's capacity or the presence of undue influence. The first of these cases was decided in 1986 by an Oklahoma appellate court.[41] The videotape showed the testator as well as the conduct of various individuals involved with the will execution ceremony. This recording was one of the factors the court cited as supporting a prima facie showing of undue influence.

In a 1987 Delaware case,[42] the testatrix executed two wills, both videotaped, as well as a non-videotaped codicil to the latter will. The judge found that a long addiction to alcohol had so impaired the testatrix' mental faculties that she lacked capacity to make a valid will. The videotape of the first will execution ceremony established that it was necessary to remind the testatrix of the nature of her investments, and that despite the reminder, she failed to understand their nature. The videotape of the second will also showed that her attorney avoided any mention of her assets. In addition, the fact that the codicil was not videotaped appeared to support the judge's finding that the codicil was procured by undue influence.

In an unpublished opinion,[43] an Ohio appellate court indicated that the most compelling evidence presented on the issue of testamentary capacity was a videotape of the will execution ceremony. The following discussion from the opinion is instructive.

> That tape discloses a man near the end of his life suffering the debilitating effects of a series of severe strokes; a man who at times appears totally detached from the proceedings. Viewing the tape clearly reveals the testator's inability to comprehend all that was going on about him. Certainly, one would seriously question his ability to dispose of several million dollars in estate assets by means of a complicated will and trust arrangement. Further, it is apparent from the tape that the whole proceeding was directed and controlled by the decedent's attorney. [The testator's] total participation was prompted by the use of leading questions. The tape further shows that the decedent lacked an accurate understanding of the extent of his property and holdings, his estimates ranging from five to eight million dollars.

In a 1989 Nebraska case, the testatrix was videotaped discussing her distribution plan with her attorney and then executing a codicil to her will.[44] The jury viewed the tape, heard other evidence, and then decided that the testatrix had capacity. The favorable finding on capacity was upheld by the Nebraska Supreme Court despite various difficulties with the tape. For example, the testatrix misstated her age by two years, made mistakes regarding the year her house burned down and the year her husband died, misstated the size of her ranch, and needed to be reminded about the identity of one of her sons. However, the tape showed that she was generally aware of her property and knew where all her sons lived and their occupations. She also explained why she was leaving more property to one of her sons. Some of the contestant's witnesses testified that during the taping the testatrix had her head down, eyes closed, and appeared to be asleep. Another witness stated she was reluctant to witness the codicil because she believed the testatrix did not know what she was doing. Both the jury and the court indicated that the videotape, its faults notwithstanding, justified giving little weight to this testimony.

These decisions may, at first glance, appear somewhat disconcerting because the videotapes

[41] Estate of Seegers v. Combrink, 733 P.2d 418, 421-22 (Okla. Ct. App. 1986).

[42] Stotlar v. Cook, 1987 WL 6091 (Del. Ch.), *aff'd without opinion*, 542 A.2d 358 (Del. 1988).

[43] Trautwein v. O'Brien, 1989 WL 2149 (Ohio Ct. App.).

[44] Peterson v. Glinn, 439 N.W.2d 516 (Neb. 1989).

were used three out of four times to support findings of invalid wills. The lack of reported decisions in which the videotape bolstered will validity, however, does not reflect poorly on the value of videotaping the will execution ceremony. Instead, the scarcity of reported cases addressing videotaped will execution ceremonies in general, and specifically those using the tape to uphold the will, is likely due to one or more of the following factors.

- A sufficient basis already exists under current law to support the admissibility of a videotape of the will execution ceremony. Thus videotapes may be frequently used at the trial level to support a will in cases which are not reported or appealed.
- Because videotape was not used in the probate process until recently, many testators who have prepared a video have not died. Therefore, the available pool of videotape cases is relatively small.
- The mere existence of the videotape reduces litigation because potential will contestants are reluctant to proceed in the face of the strong evidence provided by the tape.
- Many individuals, already disturbed by the estate planning process and unpleasant thoughts about death, are fearful of the prospect of appearing on camera and thus may prefer to forego using videotape techniques.
- The failure of an attorney to prepare a videotape of the will execution ceremony under circumstances where the reasonably prudent attorney would do so does not lead to malpractice liability in Texas and most other jurisdictions; the lack of privity between the attorney and the intended beneficiaries bars the action.[45]

b. Texas

Hammers v. Powers[46] is the first Texas case to discuss, albeit briefly, the use of a will execution videotape to demonstrate that the testatrix had testamentary capacity and was not under undue influence. In this 1991 opinion, the court examined summary judgment evidence which included affidavits, depositions, and a videotape of the testatrix signing her will. The court found that this evidence established as a matter of law that she had capacity and was not unduly influenced.

In 1999, the court in *In re Estate of Foster*,[47] had before it a case in which a videotaped will execution was introduced into evidence. The record reflected the testimony of one of the beneficiaries who originally challenged the testatrix's testamentary capacity who "stated that if the will had been read to [the testatrix] while the video tape was being made, he would not have objected to the will."[48]

3. Via Legislation

Only two states currently have legislation specifically addressing the admissibility of a video recording of the will execution ceremony: Indiana[49] and Louisiana.[50]

Several other state legislatures have

[45] *See* Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716, 718 (Tex. App.—San Antonio 1986), *writ dism'd by agr.,* 729 S.W.2d 690 (Tex. 1987); Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). *See generally* Roger M. Baron, *The Expansion of Legal Malpractice Liability in Texas,* 29 S. TEX. L. REV. 355, 361 (1987). *Cf. In re* Estate of Nibert, 1988 WL 102420 (Ohio App.) (indicating that an attorney was not responsible for will contest litigation costs for failing to videotape the will execution ceremony).

[46] 819 S.W.2d 669 (Tex. App.—Fort Worth 1991, no writ).

[47] 3 S.W.3d 49 (Tex. App.—Amarillo 1999, no pet.).

[48] *Id.* at 53.

[49] IND. CODE § 29-1-5-3 (2000 & Supp. 2009). *See generally* William R. Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate into the 21st Century*, 20 VAL. U.L. REV. 83 (1985).

[50] LA. CODE CIV. PROC. art. 2904 (Supp. 2010).

considered bills expressly dealing with videotape and the probate process, but none of the bills have been enacted. During the 1985 session of the Texas Legislature, several bills were introduced relating to using a videotape of the will execution ceremony.[51] These bills were uncomplicated, merely stating that the videotape would be admissible as evidence of the identity and competency of the testator and of any other matter relating to the will and its validity. In 1986, the New Jersey Legislature considered a bill allowing the use of videotape not only as an evidentiary tool but also as the will itself, provided a written transcript accompanied the videotape.[52] The proposal was quite detailed, requiring the videotape to comply with a laundry list of requirements. In 1987, the New York Legislature debated a simple bill allowing a videotape of the will execution ceremony to be used to prove due execution, intent, capacity, authenticity, as well as any other facts that the court decided were relevant to the probate of the testator's will or the administration of the testator's estate.[53]

4. Via Administrative Decision

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has approved videotaping the will execution ceremony. In a 1988 opinion, the Board stated that "[v]ideotaping the reading and execution of a will is not prohibited under the Code of Professional Responsibility. The testator should be made aware, however, that the videotape is not meant to replace the written will."[54]

C. Advantages Over Other Types of Evidence

A video-recording of the will execution ceremony has tremendous advantages over the use of other evidence.

1. Accuracy

An unaltered video is highly accurate. The recording reflects the events as they actually occurred during the execution ceremony thus eliminating the necessity of relying upon witnesses whose memories fade and whose impressions change with the passage of time. Likewise, the recording serves as the testator's personal statement of disposition desires without the intervention of an attorney or other scrivener.

2. Improved Testator Evaluation

The testimony of witnesses and the reading of a written will provide incomplete views of the subject under evaluation — the testator and the testator's last wishes. A video of the will execution ceremony preserves valuable non-verbal evidence such as demeanor, voice tone and inflection, facial expressions, and gestures. This type of evidence may be crucial to resolve such issues as testamentary capacity and freedom from undue influence.

3. Deterrent to Will Contest Action

A significant benefit of video-recording the will execution ceremony is the recording's ability to deter will contest actions. The testator is the key witness in an action to set aside a will, but of course, the testator is unable to defend the testator's capacity or disposition desires when the testator's testimony is needed. Fortunately, the video can preserve this important testimony. It is especially important to prepare this evidence when the testator leaves property in an unusual manner (e.g., to a friend or charity to the exclusion of the testator's spouse or children) or when the testator has some type of disability which does not affect testamentary capacity but which may give unhappy heirs an incentive to contest (e.g., a testator who is blind, illiterate, or paralyzed by a stroke).

4. Psychological Benefits

"[F]acing the reality of death and its attendant consequences is one of the most difficult

[51] Tex. H.B. 247, 69th Leg. (1985); Tex. S.B. 732, 69th Leg. (1985).

[52] H.B. 3030, 202d N.J. Leg., 1st yr. Sess. (1986).

[53] S. Res. 5098, 210th N.Y. Leg. (1987-88).

[54] Bd. of Commn'rs on Grievances & Discipline, Sup. Ct. of Ohio, 88-014 (1988).

responsibilities in life."[55] A video-recording of the will execution ceremony may help the testator, the testator's survivors, the court, and the jury better cope with this arduous task. The testator may feel more confident that the testator's desires will be carried out because the recording provides more substantial evidence of the testator's intent than the testator's written will alone. The survivors may gain solace from viewing the testator delivering the testator's final message — a loving last memory of the testator. Finally, the court and jury may be more likely to believe what they see and hear on a video than the courtroom testimony of interested persons. Thus, a will disinheriting a needy spouse or child is more likely to stand when the video clearly shows the testator's capacity and intent.

D. Potential Problems

Despite the significant benefits of preparing a video-recording of the will execution ceremony, there are several potential problems. Anyone contemplating using this technique must be aware of possible shortcomings. In some cases, steps may be taken to reduce or eliminate these problems, while in other situations the prudent decision would be not to prepare a video.

1. Poor Appearance of Testator

Although a situation may otherwise seem appropriate for video-recording the will execution ceremony, the attorney may be hesitant to expose the testator to the court. An accurate picture of the testator may lead a judge or jury to conclude that the testator was incompetent or unduly influenced. Similarly, bias against the testator may exist because of the testator's outward appearance; the testator's age, sex, race, disability, or perceived annoying habits may prejudice some individuals.[56]

If the testator's appearance is poor, it may be advisable to forego video-recording the ceremony and use other contest avoidance techniques. If the video is made and turns out badly, several difficult issues arise. Should the video be erased or deleted? If the recording is retained, will it aid the will contestant if shown? What response is proper if during the deposition stage of a will contest the attorney is asked whether the will execution ceremony was video-recorded? What can the attorney do to prevent the potentially damaging recording's introduction short of perjury? There are few, if any, good answers to these questions.

2. Staged

Opposition to the use of a video of the will execution ceremony may stem from the staged nature of the recording which arguably reduces its probative value. This objection is not unique to video-recorded evidence. Commonly, the testimony of live witnesses is rehearsed many times before it is given under oath. A witness in court is subject to cross-examination, however, while it is impossible to question a video and its principal, the testator. This objection should be easily surmounted because, unlike a reenactment or demonstration, the will execution ceremony is a staged event in the first place.

3. Distortion

Video-recordings have the potential to distort the people and events recorded. Viewed on video, the testator may appear different than the testator would in person; the testator may appear heavier, or scars and blemishes may be accented. Although distortions are inadvertent and inherent in any recording process, some distortion could be intentionally done to bolster the testator. For example, the attorney could instruct the camera operator to avoid recording the testator's perceived negative traits which would adversely impact a determination of testamentary capacity.

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[55] Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPPERDINE L. REV. 331, 348 (1979).

[56] In such cases, an audio-only tape may be appropriate. *See* Joseph S. Horrigan, *Will Contest: Evidence, Procedure, and Experts*, in STATE BAR OF TEXAS, 15TH ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE M-2 (1991).

4. Alteration

There is always a possibility that the video-recording of the will execution ceremony will be altered. The alteration could be accidental through inadvertent erasure, deletion, or exposure to a strong magnetic field. Careful storage procedures, however, greatly reduce these risks.

Intentional alteration through skillful editing and dubbing may also occur, although a video is more difficult to alter than a written document. Even though anyone with correction tape or fluid, scissors, a photocopier, and a bit of evil ingenuity can alter a written document, more sophisticated equipment and skills are required to make undetectable changes to a video. Use of a continuous display time-date generator along with a storage method requiring a documented chain of custody significantly reduces the possibility of tampering.

E. Procedure/Format for Videotaping Will Execution Ceremony

Once the decision is made to video-record the will execution ceremony, caution must be exercised to make certain the recording contains all the necessary elements and does not contain anything detracting from admissibility or evidentiary weight.

1. Inspect Equipment

The recording equipment should be inspected to insure it is in proper working order and a competent operator should be available at the appointed time.

2. Fully Brief Prospective Testator

The prospective testator should be fully briefed as to how the recording procedure will be conducted. In some situations, a "dress rehearsal" may be necessary to familiarize the testator with the recording process and avoid an appearance of anxiety or nervousness. It is important that the testator is comfortable and at ease with the situation so that the testator appears and sounds natural. Likewise, it must be impressed on the testator that all actions and statements will be recorded. Avoidance of emotional outbursts and unplanned conversation is crucial. The testator should also be instructed to avoid any potentially annoying habits such as fingernail biting and smoking.

3. Prepare Room

The room in which the recording takes place needs to be carefully prepared. Desks, tables, chairs, and so forth should appear neat and uncluttered so nothing detracts from the participants' words and actions. The room should be arranged so that a camera operating from a fixed location can record all relevant events.

4. Gather Participants

Once the room is ready, the appropriate persons should be gathered. In most cases, the only individuals present will be the testator, the attorney, two or three witnesses, a notary, and the equipment operator. To reduce claims of overreaching and undue influence, beneficiaries and family members should be excluded. In addition, no one should enter or leave the room until recording is complete.

5. Position Participants

All participants in the ceremony need to be strategically positioned in the room so that they may be easily recorded performing their various duties. For example, the testator and witnesses should be seated so they, as well as the camera, can observe the execution and attestation of the will.

6. Introductions by Attorney (pre-recording)

Before the recording begins, the attorney should thank everyone for coming and briefly review what is going to happen. The attorney should answer any last minute questions and resolve concerns. Only after everything and everyone is ready should the actual recording begin.

7. Begin Recording; Introduce Setting and Participants

As an introduction, the attorney in charge of

the ceremony should identify the situation (a will execution ceremony), state the location of the recording, and give the date and time. The camera should have a time-date generator which continuously records the date and time on the recording. The camera should then pan the entire room and each person should state his or her name, address, and role in the ceremony (e.g., witness, notary).

8. Identify Testator and Establish Awareness of Recording

The camera should then focus on a dialogue between the testator and the attorney. The testator should state the testator's name and explain that the testator is preparing to execute a will to control the disposition of the testator's property upon death. Likewise, the testator should indicate an awareness that the ceremony is being recorded with the testator's full knowledge and consent.

A brief period of recorded "small talk" may also be helpful to establish the testator's competency. The conversation should be crafted to include some references to things in the past to establish long-term memory (e.g., when did you get married, where did you go to high school) and to recent events to demonstrate short-term memory (e.g., what did you eat for breakfast, what did you do last night).

9. Demonstrate Testator's Agreement to Will Terms

The testator should then identify the appropriate document as the testator's will. The testator should read the entire will aloud, and the camera should zoom in on the will so that each page will be readable during playback. This part of the procedure is very important because it helps ensure that the document probated is identical to the one actually executed. If the testator objects to revealing the contents of the will to the witnesses and other personnel, they may leave the room during the reading of the will. The testator should then state that the testator understands the will and agrees with its dispositive and administrative provisions.

10. Establish Testator Understands Natural Objects of Bounty

The video-recording should establish that the testator understands the natural objects of the testator's bounty. The testator should provide details concerning prior marriage(s), if any (e.g., ex-spouses' names, how the marriages ended, such as by death or divorce). If the testator has any children, the testator should give their names, ages, and addresses along with information regarding other close family members such as parents, siblings, and grandchildren. This part of the ceremony is especially important if a spouse or child is being disinherited in favor of a distant relative, friend, or charity.

11. Establish Testator Understands Nature and Extent of Property

The recording should also demonstrate that the testator understands the nature and extent of the testator's property. To accomplish this, the testator should explain the types and approximate value of the testator's assets. In addition, the testator should state when the property was acquired and the source of payment to help establish the community or separate character of the property. This will help avoid claims that the testator made a will believing the contents or value of the testator's estate to be vastly different from its true condition.

12. Establish Testator Understands Disposition of Property Made by Will

The recording should reflect the testator's understanding of the disposition of the testator's property. If the testator makes controversial or unusual gifts or if close family members are omitted, it may be advisable for the testator to explain the testator's disposition plan and the reasons therefore.[57]

13. Establish Lack of Undue Influence

The video-recording might also be used to rebut claims that the testator was exposed to undue influence. In this regard, the attorney should ask the testator if others have badgered

[57] *See supra* § III, page 3.

the testator to make a will containing particular provisions. If any of those persons are present, they should be asked to leave. The attorney should also ask the testator whether anyone has threatened to withhold medicine, food, or love or threatened to harm the testator in any way if the will was not written in a certain manner. The attorney should pose sufficient questions to convince someone watching the tape that the will reflects the testator's disposition plan and not that of someone else.

14. Permit Testator to Discuss Will Contest Suspicions

If the testator has any particular fears or suspicions that unhappy heirs are likely to contest the will, the testator should explain the grounds for these concerns. The recording's usefulness to prevent or win a will contest action is increased if the testator discusses the exact grounds for contest and provides appropriate explanations. Prior to the ceremony, the attorney must caution the testator to refrain from using language that might provoke a will contest or be considered slanderous.

15. Conduct Standard Will Execution Ceremony

The next part of the video-recording procedure is the standard will execution ceremony as discussed in § VI. The attorney should ask the testator if the testator requests the witnesses to attest to the signing of the will. The testator should clearly answer in the affirmative. The testator should then initial each page of the will and sign it at the end while the camera focuses on the testator's actions and the witnesses observing the testator signing the will. Next, the attorney or a witness should read the attestation clause. All witnesses should then initial each page of the will and sign at the end. The camera should follow the action closely so that the actual attestation and the testator's observation thereof are recorded. The recording should also document the execution of the self-proving affidavit.

The actual ceremony would then be finished and recording would stop.

16. Review Recording

The recording should be viewed to ensure that all appropriate words and actions were clearly recorded. This step also helps establish that the equipment was functioning properly, the operator was competent, and the recording accurately reflects what transpired.

17. Obtain Affidavit of Equipment Operator

The camera operator should sign an affidavit describing the operator's experience and qualifications, explaining the type of equipment used, and stating that the equipment was in proper working order during the recording. This would be helpful if a foundation for admissibility is needed and the camera operator or other witnesses are unavailable.

18. Store Video-recording in Secure Location

The video should be stored so it is safe from fire, theft, magnetic fields, heat, and unauthorized access. This storage location should be readily accessible upon the death of the testator. A common repository is a safe deposit box because its entry records are useful in showing the recording's chain of custody.

F. Conclusion

The legal profession, steeped in tradition and precedent, is often hesitant to adopt new techniques. To provide clients with the best legal services available, however, estate planners must remain abreast of technological developments such as video-recording. Each time a will is prepared, the drafter should determine the likelihood of whether additional evidence of the will execution ceremony will be necessary. If so, serious consideration should be given to video-recording the will execution ceremony. This modern procedure permits the accurate preservation of the testator's words and actions. The superior evidence of the testator's mental and physical condition provided by a video may prove invaluable should a will contest materialize. Although not without its disadvantages, the use of video has a tremendous potential for avoiding a successful will contest

and improving the likelihood that testamentary desires are effectuated.

VIII. SELECT WITNESSES THOUGHTFULLY

Little thought is usually given to the selection of witnesses. Typically, witnesses are individuals who just happen to be available at the time of will execution, e.g., secretaries, paralegals, law clerks, and other attorneys. It may be that the testator sees the witnesses for the first and last time at the ceremony. In most cases, this practice is not harmful; the self-proving affidavit removes the necessity for finding the witnesses and the vast majority of wills are uncontested. The situation is considerably different, however, if a contest arises and the testimony of the witnesses as to testamentary capacity or the details of the will execution ceremony is crucial.

A. Witnesses Familiar with Testator

"The jury is likely to give little weight to the testimony of a witness who never saw the testator before or after the execution of the will, and whose opportunity to form a conclusion was limited to the single brief occasion."[58] Accordingly, if the attorney anticipates a will contest, it is prudent to select witnesses previously acquainted with the testator, such as personal friends, co-workers, and business associates. These people are more likely to remember the ceremony and provide testimony about how the testator acted at the relevant time. In addition, they can compare the testator's conduct at the ceremony with how the testator acted at a time when the contestants concede that the testator had capacity.

Considerable debate exists regarding the wisdom of having health care providers serve as witnesses or attend the will execution ceremony. The doctors and nurses who care for the testator appear well-qualified to testify about the testator's condition. During cross-examination, however, details about the testator's illness may come out that would not otherwise have been discovered. This additional information may prove sufficient to sway the fact-finder to conclude the testator lacked capacity.[59] The danger is heightened if the doctor is a psychiatrist. "The very presence of a psychiatrist may be seized upon by the contestant as indicative of doubt as to testamentary capacity and, by adroit handling, may be caused to operate adversely to the proponent."[60]

B. Supernumerary Witnesses

Although attested wills require only two witnesses under Texas law,[61] extra witnesses may be advisable if a contest is likely. Additional witnesses provide a greater pool of individuals who may be alive, available, and able to recollect the ceremony and the testator's condition.

C. Youthful and Healthy Witnesses

The attorney should select witnesses who are younger than the testator and in good health. Although it is no guaranty, the use of young, healthy witnesses increases the likelihood that they will be available (alive and competent) to testify if the will is contested.

D. Traceable Witnesses

An attorney charged with locating attesting witnesses to counter a will contest is often faced with a difficult task. Witnesses may move out of the city, state, or country. In addition, witnesses may change their names (e.g., a female witness marries and adopts husband's name or a married female divorces and retakes maiden name). To increase the chance of locating crucial witnesses, the attorney should select people who appear easy to trace, e.g., individuals with close family, friendship, business, educational, or political ties with the local community.

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[58] 17 MARION K. WOODWARD & ERNEST E. SMITH, III, PROBATE AND DECEDENTS' ESTATES § 336, at 278 (Texas Practice 1971).

[59] *See* Charles C. Allen, *The Will Contest: An Acid Test of Will Drafting,* 6 ST. LOUIS UNIV. L.J. 1, 18 (1960).

[60] Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 93 (1958).

[61] TEX. ESTATES CODE § 251.051(3).

E. Witnesses Who Would Favorably Impress the Court and Jury

The attorney should carefully evaluate the personal characteristics of the witnesses. The witnesses should be people who would "make a good impression on the court and jury — substantial people of strong personality who speak convincingly and with definiteness."[62]

IX. OBTAIN AFFIDAVITS OF INDIVIDUALS FAMILIAR WITH TESTATOR

One of the most convincing types of evidence of a testator's capacity is testimony from individuals who observed the testator at and around the time the will was executed. Frequently, however, this testimony is unavailable at the time of the will contest action; the witnesses to the will may be dead, difficult to locate, or lack a good recollection of the testator. The same may be true of other individuals who had personal, business, or professional contacts with the testator. One way of preserving this valuable evidence is to obtain affidavits from these people detailing the testator's conduct, physical and mental condition, and related matters. Affidavits of attesting witnesses, individuals who spoke with the testator on a regular basis, or health care providers (doctors, psychiatrists, nurses) who examined the testator close to the time of will execution, will help protect this potentially valuable testimony should a will contest arise.

X. DOCUMENT TRANSACTIONS WITH TESTATOR VERIFYING INTENT

Under normal circumstances, the testator orally explains the desired disposition plan and the reasons therefore, the attorney takes scribbled notes, the attorney prepares a draft of the will, the testator makes oral corrections, and then the attorney prepares the final version of the will. This procedure supplies little in the way of documentation to refresh the attorney's memory about the details of the testator's situation nor to use as evidence in a will contest action. If a contest is anticipated, all of these steps should be documented in writing, on videotape, or both. For example, the testator could write a letter to the attorney explaining the disposition scheme and motivating factors behind it. The attorney's written reply would warn that a contest may occur because of the disinheritance of prospective heirs, unequal treatment of children, excessive restrictions on gifts, etc. The testator would respond in writing that the testator has considered these factors but prefers to have property pass as originally indicated. The attorney should take detailed notes of all meetings with the testator as well as of the will execution ceremony. The attorney would then carefully preserve these documents for use should the will be contested.[63]

XI. "COINCIDENTAL" DOCTOR APPOINTMENT

On the same day as the testator executes the will, the testator may wish to visit his or her doctor for an annual physical or other routine appointment. If the will is later contested for lack of capacity, the doctor can testify that the testator was seen that day and if mental capacity had been questionable, the doctor would have so indicated in the testator's medical records and taken appropriate steps.

XII. OBTAIN OTHER EVIDENCE TO DOCUMENT TESTATOR'S ACTIONS

Gathering evidence to rebut a will contest is always easier while the testator is alive. Along with affidavits of individuals familiar with the testator and documenting testator's intent, the attorney may want to acquire additional evidence. For example, the testator may have letters from a child showing family discord supporting the testator's reasons for disinheriting

[62] Jaworski, *supra* note 60, at 91.

[63] *See* Jaworski, *supra* note 60, at 91-93.

the child. Or, the attorney may wish to collect the testator's medical records and may easily do so by having the testator sign a release.

XIII. PRESERVE PRIOR WILL

When a new will is executed, it is common practice to physically destroy prior wills. If the testator's capacity is in doubt, however, and the testator indicates that the testator prefers the prior will to intestacy, it is a good idea to retain the prior will. If a court holds that the new will is invalid, the attorney may offer the old will for probate much to the chagrin of the contestant.[64]

XIV. REEXECUTE SAME WILL ON REGULAR BASIS

What happens when a will contest is successful? The estate passes under a prior will, or if none, via intestacy. As discussed in § XII, it may be a good idea to preserve a prior will if the testator prefers its disposition to intestacy. However, the testator clearly prefers the new will to both the old will and intestacy. Thus, the attorney could have the testator reexecute the same will on a regular basis, for example, once every six months. At the time of the testator's death, the most recent will would be offered for probate. If a contest is successful, then the will executed six months prior would be introduced. If that one is likewise set aside, the will executed one year prior would be introduced, and so on until all wills are exhausted. A potential contestant might forego a contest when the contestant realizes that sufficient reasons for contest would have to be proved for many different points in time.[65]

XV. SUGGEST THAT TESTATOR CONSIDER MAKING A MORE TRADITIONAL DISPOSITION

Unusual dispositions, such as those disinheriting close family members, treating like-situated children differently, and imposing excessive restrictions on gifts, are apt to trigger contests. Therefore, the attorney may wish to suggest that the testator consider toning down the disposition plan to bring it closer to conforming to a traditional arrangement. Of course, the client may balk at this recommendation. The attorney should explain that although this may cause the testator to deal with property in an undesired way, it may reduce the motives for a contest and thus increase the chances of the will being uncontested. (Or stated another way, half a loaf is better than no loaf at all.) Alternatively, other estate planning techniques may be used to make unconventional dispositions.

XVI. MAKE SIGNIFICANT INTER VIVOS GIFT TO DISINHERITED HEIR APPARENT AT TIME OF WILL EXECUTION

The testator may wish to make an inter vivos gift, either outright or in trust, to a disinherited heir apparent at the same time the will is executed (i.e., minutes after will execution). This gift should be substantial but, of course, far less than the amount the heir apparent would take via intestacy. After the testator's death, the heir is less likely to contest the will on the basis of lack of testamentary capacity. By asserting lack of capacity, the contestant would be forced to concede that the contestant accepted property from a person who lacked the capacity to make a gift or establish a trust. In addition, should the contest succeed, the heir would be required to return any property already received to the estate or use it to offset the intestate share.

[64] *See* Jaworski, *supra* note 60, at 95.

[65] *See* Brown, *Re-Signed Will-Revisited,* 36 J. ST. B. CAL. 344 (1961); Brown, *The Re-Signed Will,* 35 J. ST. B. CAL. 685 (1960).

XVII. CONTRACT NOT TO CONTEST

The testator could enter into a contract not to contest with the potential will contestants.[66] In exchange for the payment of money or a transfer of other property, the heirs (or beneficiaries of prior wills) could bind themselves contractually not to contest the will. If the contract is drafted to meet all the elements of a valid contract, it should be enforceable, especially in light of the cases validating a contract to convey an inheritance.[67]

XVIII. RECOMMEND USE OF ALTERNATIVE ESTATE PLANNING TECHNIQUES

Whenever the attorney anticipates a will contest, the attorney should consider using other estate planning techniques to supplement the will. Inter vivos gifts, either outright or in trust, multiple-party accounts, and life insurance, annuities, and other death benefit plans are just some of the alternative techniques available to the estate planner. Although these arrangements may be set aside on grounds similar to those for contesting a will, such as lack of capacity or undue influence, they may be more difficult for a contestant to undo. More people may be involved with the creation or administration of these techniques thereby providing a greater number of individuals competent to testify about the client's mental condition. In addition, the contestant may be estopped from contesting certain arrangements if the contestant has already accepted benefits as, for example, a beneficiary of a trust. Furthermore, many of these techniques may be used to secure other benefits such as tax reduction, reduced need for guardianship, probate avoidance, and increased flexibility.

XIX. ANTE-MORTEM PROBATE

"[T]he post mortem squabblings and contests on mental condition . . . have made a will the least secure of all human dealings."[68]

A. Introduction

The ultimate goal of estate planning is to ascertain and effectuate the intent of each individual to the fullest extent possible within legal boundaries. One of the most common estate planning techniques used to accomplish this laudable purpose is the will, a document memorializing a person's desires regarding the disposition of property, designation of fiduciaries, and other related matters, which is poised to take effect upon the testator's death.

Formal proof of a person's will may not occur in most states until after the testator's death. This procedure prevents the person who has the most important evidence of intent, the testator, from testifying. Consequently, estate planners are constantly striving to ascertain whether all technical requirements for a valid will are satisfied as well as preparing for potential battles against disgruntled heirs preferring an ineffective will so that they may receive a larger portion of the decedent's estate via intestate distribution or an earlier will. A progressive technique with tremendous potential for improving the estate planner's ability to assure that a testator's desires will be carried out upon death is to validate the will during the testator's lifetime — an *ante-mortem* or *living* probate. The testator would then be assured that the testator's wishes will be carried out after death and will be able to die with the knowledge and confidence that the will is safe from contest. [69]

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[66] *See* Letter from Robert Jorrie, attorney, San Antonio, Texas, to Michael Cenatiempo, attorney, Houston, Texas (Feb. 22, 1994).

[67] *See* Mow v. Baker, 24 S.W.2d 1 (Tex. Comm'n App. 1930, holding approved).

[68] Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 30 (Mich. 1885).

[69] *See* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990) (portions of this section are adapted from this article).

B. Significant Problems With Post-Mortem Probate Under the Law of Most States

Although functioning adequately in the majority of situations, post-mortem probate poses many difficulties which frustrate the intent of the testator as well as waste court time and estate resources. A few of these problems will be discussed along with some of the traditional solutions used to ameliorate these problems.

1. Mere Technical Errors May Invalidate Otherwise Valid Will

Under the law of most states, even the simplest of errors can result in the invalidation of the testator's entire will despite clear and convincing evidence that the testator was competent and truly intended the disposition plan directed in the will. For example, the testator may not be in the presence of the witnesses when they attest to the will.[70] Other situations leading to invalidity include the will having only one witness, an unwitnessed will containing too much material not in the testator's own handwriting to qualify as a holographic will, and the incompetency of one of the witnesses.

To avoid these problems, a person may elect to use various non-probate transfers such as inter vivos trusts, joint ownership with survivorship rights, and outright gifts. Despite the effectiveness of these techniques in many circumstances, they have potentially undesirable consequences, e.g., outright gifts require total control over the property to be sacrificed, trusts may be set aside for lack of capacity or undue influence, and joint ownership may give too many rights to the joint owner. Public policy is not served when the use of non-probate transfers is primarily motivated by fears that testamentary instructions will not be carried out.

[70] Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (court invalidated a will because the testator could not have observed the witnesses signing the will without walking four feet to an office door and fourteen feet down a hallway).

2. Spurious Will Contests Encouraged

One of the laudable purposes of a will contest is to ensure that deserving heirs are not deprived of a share of the decedent's estate as a result of the testator's lack of capacity when the will was executed or because a devious person defrauded or exerted undue influence on a susceptible testator. Synthesized by greedy plots of unhappy heirs, however, will contests are often filed to prove lack of mental capacity, fraud, or undue influence where none existed. Even if the contest is unsuccessful, estate funds are wasted and innocent beneficiaries must endure emotional upheaval and delay. Unfounded will contests may also lead to settlements entered into only to prevent further depletion of the estate and which result in distributions not intended by the testator.

3. Testator Unavailable to Testify

An inherent difficulty with post-mortem probate is that it requires the trier of fact to determine the competency and desires of the testator without having the key witness, the testator, available for questioning. Only indirect evidence is available to evaluate the testator's capacity which, whether the testator was incompetent or simply eccentric with property, tends to be a matter of mere speculation. The quality of any evidence, such as the testimony of witnesses to the will, tends to deteriorate with time as memories fade and perceptions change.

A relatively modern technique which may be used to partially solve this problem is to videotape the will execution ceremony. If the will execution ceremony is preserved on videotape, the testator is effectively brought into the courtroom during a contest although, of course, the testator is not subject to cross examination. Despite the tremendous benefits of this technique, it pales in comparison to ante-mortem probate where the actual testator is available for direct observation.

C. Development of Ante-Mortem Probate

In many respects, ante-mortem probate is not a product of this century or even the previous one. Ancient laws and customs recorded in the

Bible show how a type of validation of a will during a person's lifetime was used to facilitate inheritance. An early example can be found in the book of Genesis. During the time of Isaac, the accepted way for a father to pass his property to his eldest son was by blessing the son near the end of the father's life.[71] To trick his nearly blind father, Jacob, a younger son, wore a sheepskin to appear hairy like the elder son Essau. The scam worked and Jacob received Isaac's (the testator's) irrevocable blessing (testamentary gift).[72]

There is evidence that early in the development of English ecclesiastical law a testament could be proved during the testator's lifetime at the testator's request.[73] Upon the testator's petition, the testament was recorded and registered but would have no effect until the testator actually died.[74] The testator could still revoke or alter a will so recorded and registered.[75] However, there is little evidence explaining the effect of a pre-death registration on the disgruntled heirs' ability to contest the testament after the testator's death. As the law evolved, these pre-death procedures were abandoned leaving the ecclesiastical courts with jurisdiction over the probate of deceased persons' wills.[76]

While the Anglo-American legal system wrestled with problems triggered by post-mortem probate, the civil law systems of Europe developed the "authenticated will."[77] Under European notarial procedure, a testator who is fearful of a post-mortem contest can execute a will and thereafter possess both the executed will and evidence of capacity.[78] Unlike their United States counterparts, European notaries are quasi-judicial officers, usually lawyers, who are experienced in determining a testator's capacity and freedom from undue influence at the time of will execution.[79] Once the notary authenticates the will, it gains great credibility and is difficult to set aside in a post-mortem proceeding.[80]

1. The Michigan Attempt at Ante-Mortem Probate

In 1883, the Michigan legislature made a valiant attempt to cope with the disruptive and uncertain post-mortem probate procedures.[81] The testator was authorized to petition the probate judge of the testator's county of residence for the will to be admitted and established as the testator's last will and testament.[82] The petition was required to contain averments that the will was executed by the testator "without fear, fraud, impartiality, or undue influence, and with full knowledge of its contents."[83] The testator was also required to allege that the testator was of sound mind and memory and had full testamentary capacity.[84] In addition, the testator was required to provide the names and addresses of the individuals who would be the testator's heirs were the testator to die intestate as well as

[71] *Genesis* 27:1-4.

[72] *Id.* at 27:5-38.

[73] *See* HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS, Part 6, § 13, at 65-66 (1635) (photograph reprint 1979).

[74] *Id.*

[75] *Id.*

[76] *See* Allen v. Dundas, 3 T.R. 125, 130 (1789).

[77] *See* John H. Langbein, *Living Probate: The Conservatorship Model,* 77 MICH. L. REV. 63, 65 (1978).

[78] *See id.* at 63-71 (the use of notaries is expensive and thus they are seldom used because there are more economical methods of creating a valid will).

[79] *See id.* (a continental notary is obliged to satisfy him- or herself of the testator's compliance with will formalities and the testator's identity when examining a purported will).

[80] *See id.* (European law attaches an extremely strong presumption of validity to a notary's authentication on the premise that the notary is an expert in legal paperwork who takes statutory responsibilities seriously).

[81] *See* 1883 Mich. Pub. Acts 17.

[82] 1883 Mich. Pub. Acts 17, § 1.

[83] *Id.* § 2.

[84] *Id.*

other persons whom the testator desired to be parties to the proceeding.[85]

The judge would then set a hearing date, issue citations to the parties named in the petition, and direct publication of a notice of the hearing.[86] After receiving proof that the citations were served and the notice published, the judge would conduct a hearing inquiring into all matters alleged in the petition.[87] In addition, the judge was granted the authority to examine the witnesses to ascertain relevant facts.[88]

If the judge determined that the testator's allegations were true, the judge would issue a decree setting forth these findings.[89] A copy of the decree would be attached to the will, having the same effect as a post-mortem decree and considered conclusive as to the matters stated therein.[90] The statute attached no requirement that the process be repeated if the testator wanted to revoke or alter the will.[91]

The usefulness of this innovative statute was short-lived. The Michigan Supreme Court declared the statute unconstitutional in 1885.[92] Two grounds were propounded for the statute's invalidity: (1) It enabled the testator to avoid the rights of a spouse and child; and (2) it failed to provide for finality of judgment.[93] The finality debate stemmed from the statute's policy of determining a will to be valid, yet reserving in the testator the power to freely amend, revoke, or alter the will.[94]

A concurring opinion advocated the rejection of ante-mortem probate outright pointing out that "the living can have no heirs" and that a will cannot be final until the death of the testator.[95] The concurring justices also expressed concern about the possible harm to a family which may flow from the ante-mortem process.[96] Finally, the Michigan Supreme Court seemed to feel that because future potential heirs did not have a legal interest in the proceedings, there was not an adverse party in interest so as to constitute a legal "case or controversy" and thereby convey jurisdiction upon the court. Thus, the issuance of a judicial determination would be paramount to issuing an advisory opinion which Michigan's constitution prohibited.[97]

2. Wills of Native Americans

In 1910, Congress enacted a type of ante-mortem probate applicable to certain Native American tribes under the guardianship of the federal government.[98] This procedure permitted a Native American whose will disposed of certain allotments held under trust by the government to have the Secretary of the Interior approve the will prior to death.[99] The Secretary's approval was final unless fraud was discovered in connection with the execution or procurement of the will within one year after the testator's death.[100]

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[85] *Id.*

[86] *Id.* § 3.

[87] *Id.* If any person named in the testator's petition was a minor or under a disability, the judge was required to appoint a guardian ad litem to represent the person. *Id.* § 4.

[88] *Id.* § 4.

[89] *Id.*

[90] *Id.*

[91] *Id.* § 6.

[92] Lloyd v. Wayne Circuit Judge, 56 Mich. 236, 239, 23 N.W. 28, 29 (1885).

[93] *Id.* at 238-39, 23 N .W. at 28-29.

[94] *See* Note, *Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives,* 32 CASE W. RES. L. REV. 823, 827 (1982).

[95] *Lloyd,* 56 Mich. at 240-41, 23 N.W. at 30 (Campbell, J., concurring).

[96] *Id.* at 241-242, 23 N.W. at 30-31(Campbell, J., concurring).

[97] *Id.* at 239, 23 N.W. at 29.

[98] Act of June 25, 1910, ch. 431, § 1, 36 Stat. 886 (codified at 25 U.S.C. § 373 (1990)).

[99] *Id.*

[100] *Id.*

The potential for development of this ante-mortem technique was never realized. The 1923 regulations governing the Interior Department's approval of wills indicated that the preferred practice was to accept the submitted will, but not to approve it until after the testator's death.[101] This restriction on any true ante-mortem probate has been continued in subsequent regulations.[102]

3. Renewed Interest in the 1930's

After a period of disenchantment followed by disinterest, ante-mortem probate was revived in the 1930's. The National Conference of Commissioners on Uniform State Laws formed a special committee to draft a uniform act creating a procedure to validate a will before the death of the testator.[103] The Committee proposed two methods. The first permitted the testator simply to file the will for safekeeping with the clerk of the court.[104] The second method, described below, was a true ante-mortem probate procedure.[105]

The first tentative draft of the act which delineated the true ante-mortem probate procedure provided that the testator could initiate the ante-mortem process by filing a will with the clerk of the court together with a list of the witnesses to the will.[106] The testator would then file a petition naming the testator's spouse and prospective heirs as defendants.[107] Assuming the petition was filed in a court with appropriate jurisdiction, the court would issue service of process to the named defendants.[108] If any process was returned unserved, notice by publication would be substituted.[109]

If, after proper notice and a hearing, the will was admitted to probate, the testator was conclusively presumed to have executed the writing with full testamentary intent and capacity and without "fear, fraud, importunity, or undue influence."[110] Any aggrieved party could appeal the court's judgment, and the testator was free to revoke the will in a subsequent writing or through a written withdrawal without having to bring such action to the attention of the court.[111]

The tentative draft was not met with a positive response. This may have been due to objections that the proposal would place the Commissioners "in the position of advocating new legislation rather than reforming current legislation."[112] On the other hand, many legal commentators of the day supported the concept of ante-mortem probate,[113] advocating systems which allowed for different methods of civil law authentication of testamentary documents.

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[101] DEPARTMENT OF THE INTERIOR, UNITED STATES INDIAN SERVICE, DETERMINATION OF HEIRS AND APPROVAL OF WILLS, § 37 (1915), *reprinted in* WILLIAM P. FRANCISCO, FEDERAL INDIAN PROBATE LAW 170 (1979). *See generally id.* at 60 (discussing how 1923 Regulations limited practice of approving wills prior to testators' deaths).

[102] *See* 43 C.F.R. § 4.260(b) (1995) (current regulation regarding care of an Native American's will which allows approval as to form only).

[103] Martin, *Report of Special Committee on Uniform Act to Establish Wills Before Death of Testator,* 9 A.L.I. PROC. 463 (1932).

[104] *Id.*

[105] *Id.* The research of the Conference's committee indicated that no state currently had a true ante-mortem probate procedure.

[106] First Tentative Draft of Uniform Act to Establish Wills Before Death of Testator § 2(b), 9 A.L.I. PROC. 465 (1932).

[107] *Id.* § 3. The statute also contained a form for the testator to use.

[108] *Id.*

[109] *Id.* The court would appoint a guardian ad litem for minors and individuals with legal disabilities.

[110] *Id.* §§ 2 & 3.

[111] *Id.* §§ 3 & 4.

[112] Howard Fink, *Ante-Mortem Probate Revisited: Can An Idea Have a Life After Death?,* 37 OHIO ST. L.J. 264, 289 (1976) (citing HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS AND UNIFORM STATE LAWS AND PROCEEDINGS, at 143 (1931)).

[113] *See, e.g.,* Daniel H. Redfearn, *Ante-Mortem Probate,* 38 COM. L.J. 571. (1933); David F. Cavers, *Ante-Mortem Probate: An Essay in Preventive Law,* 1 U. CHI. L. REV. 440 (1934); Harry Kutscher, *Living Probate,* 21 A.B.A. J. 427 (1935).

4. The Texas Attempt at Ante-Mortem Probate

In 1943, the Texas Legislature enacted a comprehensive statute authorizing courts to make declaratory judgments. One of the statute's provisions allowed an interested person under a will to have any question of construction or validity arising thereunder determined by a declaratory judgment.[114] The door to ante-mortem probate was thus opened, and it was less than ten years later that living probate was tested under this statute.

In *Cowan v. Cowan*,[115] two of the testator's three children sought to have the will of their living mother declared invalid on grounds of lack of testamentary capacity, insane delusions concerning the objects of her bounty, and undue influence. Despite the seeming authorization of such actions by the declaratory judgment statute, the court determined that it had no jurisdiction to determine the validity of a will of a person who was still alive. The court reasoned that because it did not have such jurisdiction prior to the enactment of the declaratory judgment statute, it did not subsequently obtain that jurisdiction; the declaratory judgment statute did not create new substantive rights but was only remedial in nature and provided a new method of exercising existing jurisdiction. The court noted that the will was ambulatory and that "those named as beneficiaries are devisees only in the embryo." Additionally, the Probate Code did not permit the probate of a will of a living person.[116]

In 1994, the Texas Real Estate, Probate & Trust Law Council studied the possibility of drafting a Texas ante-mortem statute. Despite believing that ante-mortem probate would be a useful procedure, the Council decided not to move forward with legislation because of the existence of more pressing concerns.

5. Proposals for the Model and Uniform Probate Codes

During the early 1940's, the drafters of the Model Probate Code (MPC) gave brief consideration to the possibility of including provisions for ante-mortem probate.[117] The introduction to the MPC explains in terse language how the drafters carefully considered ante-mortem probate and concluded that "[t]he practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding."[118]

In the early stages of the development of the Uniform Probate Code (UPC), the drafters again gave serious consideration to inclusion of an ante-mortem procedure.[119] The proposed procedure faired better than the earlier MPC version as evidenced by the summer 1967 draft which contained provisions permitting the testator to petition the court "for an order declaring that his Will has been duly executed and is his valid Will subject only to subsequent revocation."[120] This action would be declaratory in nature and would allow the testator to revoke the submitted will by a simple withdrawal procedure or by a subsequent written will or codicil.[121]

The comments which accompanied the proposed sections reflected the benefits of ante-mortem probate. For example, one comment stated that ante-mortem probate is "often recommended and is of considerable attraction to the public. Its availability offers some insurance

[114] TEX. CIV. PRAC. & REM. CODE § 37.004 (original version substantially similar).

[115] 254 S.W.2d 862, 863 (Tex. Civ. App.—Amarillo 1952, no writ).

[116] TEX. ESTATES CODE § 256.002 (prior versions substantially similar).

[117] LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW 20 (1946) (containing text of MODEL PROBATE CODE).

[118] *Id.*

[119] WILLIAM D. ROLLISON, COMMENTARY ON THE UNIFORM PROBATE CODE 25 (1970).

[120] Summer, 1967, Draft of the Uniform Probate Code § 2-903, *quoted in* WILLIAM D. ROLLISON, *supra* note 119.

[121] *Id.* § 2-906, *quoted in* WILLIAM D. ROLLISON, *supra* note 119, at 26.

against unwarranted Will contests."[122] Despite the initial sanctioning of this progressive estate planning technique, the drafters omitted any reference to ante-mortem probate in subsequent drafts of the UPC. It was not until almost a decade later that a significant resurgence of interest in ante-mortem probate occurred.[123]

6. Academics Develop Ante-Mortem Probate Models

With the onset of the nation's bicentennial came a resurgence of interest in the field of ante-mortem probate. Between 1976 and 1982, many articles were written expressing both the advantages and disadvantages of the ante-mortem alternative.[124] During this period, writers addressed four problem areas: (1) inchoate rights, (2) the living have no heirs, (3) the security of the testator, and (4) the lack of enabling legislation.[125] From these criticisms and concerns, three basic ante-mortem probate models emerged.

a. The Contest Model

The first model, proposed by Professor Howard Fink of The Ohio State University, is closely related to the Michigan Act of 1883. Referred to as the contest model, this proposal places the testator and the prospective heirs in an adversarial situation which allows for a declaratory judgment.[126] Standing is granted, and notification is provided to all persons who would be heirs by intestate succession as well as to all beneficiaries under the will.[127] A guardian ad litem is appointed to protect the interest of any unborn or unascertained heirs.[128]

After executing a will, the testator brings suit requesting the court, through a declaratory judgment, to deem the will valid.[129] If, after considering the signatures, number of witnesses, testamentary capacity, and absence of undue influence, the court determines the will is valid, the will would be filed with the court.[130] It could be nullified by repeating the process.[131] All nine jurisdictions currently permitting ante-mortem probate, Alaska[132], Arkansas[133], Delaware[134], New Hampshire[135], North Dakota[136], Nevada[137], Ohio[138], and South Dakota[139], have based their statutes on the contest model.

While the contest model offers some solutions to the problems of ante-mortem probate, it is expensive and leaves many questions unanswered.[140] However, the contest model solves the problem of finality by making the will binding on all parties; it is susceptible to change only by a second judgment.[141] Disclosure of the will's contents and the adversarial nature of the procedure, which may cause unrest and disharmony between family and friends of the testator, are the proposal's greatest flaws.[142]

b. The Conservatorship Model

In 1980, Professor John Langbein of the University of Chicago attempted to solve the

[122] *Id.*

[123] WILLIAM D. ROLLISON, *supra* note 119, at 26.

[124] *See, e.g.,* Fink, *supra* note 112, at 264; Langbein, *supra* note 77, at 63.

[125] *See* Note, *supra* note 94, at 830-32.

[126] Fink, *supra* note 112, at 274-75.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] ALASKA STAT. § 13.12.535-.590.

[133] ARK. CODE § 28-40-201- 203.

[134] 12 DEL. C § 1311.

[135] N.H. REV. STAT. §§ 552:18, 564-B:4-406.

[136] N.D. CENT. CODE § 30.1-08.1-01 to -04.

[137] NEV. REV. STAT. § 30.040.

[138] OHIO REV. CODE § 5817.01-.14

[139] S.D. CODIFIED LAWS § 21-24-3; S.D. CODIFIED LAWS § 55-4-57.

[140] *See* Note, *supra* note 94, at 836.

[141] Fink, *supra* note 112, at 275.

[142] *See* Note, *supra* note 94, at 836.

problems of the contest model with his proposal of the conservatorship model.[143] This model, like the contest model, relies on a declaratory judgment to establish finality. Unlike the contest model, however, this model tries to avoid the strife involved in intrafamilial litigation by appointing a conservator to litigate the interests of the prospective heirs and beneficiaries.[144] Unfortunately, the conservatorship model is also plagued with the problems of notice, jurisdictional function, and unrest caused by public disclosure of the contents of the will.[145] Because both the contest and conservatorship models rely on declaratory judgments, the will and any contest thereof becomes a part of the public record.

c. The Administrative Model

The administrative model, proposed by University of Georgia Professors Gregory Alexander and Albert Pearson, is a significant departure from the contest and conservatorship models. This model envisions a two-step process: (1) the enactment of empowering legislation;[146] and (2) the revision of the statutory conditions on the rights to contest a will.[147] Under this theory, the ante-mortem experience would be neither judicial nor adversarial. The model relies on an ex parte proceeding in which the testator and the testator's circumstances are considered to determine the will's validity rather then a system resembling an accelerated will contest.[148]

The process begins with the testator petitioning the proper court for a determination of the validity of the will.[149] All court proceedings would be in camera to provide the privacy which is lacking in the other models under which the will becomes a matter of public record.[150] Like the conservatorship model, a guardian ad litem would be appointed. However, this guardian would be an investigating agent of the court rather than a fiduciary of the heirs and beneficiaries.[151] The guardian would privately interview the testator to determine the existence of undue influence or lack of capacity.[152] The guardian would not normally be informed of the contents of the will, though the judge could disclose any provisions of the will which are unusual, such as those that disinherit close relatives or make large charitable gifts, to better enable the guardian to conduct a thorough investigation.[153]

The necessity of giving notice of the proceeding to anyone except the guardian ad litem would be eliminated on the pretense that potential heirs have no constitutional right to notice.[154] Under the administrative model, a prospective interest in the estate, were the testator to die intestate, is considered to be too weak to require notice. Family members, however, might receive indirect notice of the ante-mortem probate proceedings should they become aware of the guardian ad litem's investigation.

7. National Conference of Commissioners on Uniform State Laws

Responding to the renewed interest in ante-mortem probate reflected by both state legislatures and legal commentators, the National Conference of Commissioners on Uniform State Laws began investigating the feasibility of ante-mortem probate in 1979. By late 1980, the Uniform Ante-Mortem Probate of Wills Acts drafting committee considered two proposals: (1) a declaratory judgment/contest model format developed by the Joint Editorial Board —

143 Langbein, *supra* note 77, at 63, 80.

144 *See id.* at 78-80.

145 *Id.*

146 Gregory Alexander & Albert Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession,* 78 MICH. L. REV. 89, 112 (1979).

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at 114.

154 *Id.* at 115.

Uniform Probate Code (Draft A), and (2) an administrative model based on the writings of Professors Alexander and Pearson drafted by the Ante-Mortem Probate of Wills Act Committee (Draft B).

Draft A reflects the contest approach and was derived from the three state statutes which were already in effect. [155] The most significant difference between the state statutes and Draft A is that under Draft A's procedure any judgment which the testator obtained declaring that the will had been duly executed and is the testator's valid will subject only to revocation, would not be binding on the testator's spouse and descendants. This limitation severely undermines the usefulness of Draft A because it is most often the spouse and descendants who initiate a will contest, especially when they are left less than the amount they would receive under intestacy.

Under the Draft A procedure, the testator begins the process by filing the will and allegations of its proper execution with the appropriate court.[156] The defendants to the action are a representative group chosen from the testator's presumptive heirs and any other persons who have some prospect of being a devisee of the testator, usually because of their status as devisee under a previous will. If the only presumptive heirs are the spouse and descendants of the testator, the defendants would be chosen from those who would be presumptive heirs if the testator had no spouse or descendants.[157]

After proper notice, the court would conduct a hearing to examine the testator, the attesting witnesses, and any other relevant evidence.[158] Additionally, the court would be entitled to make any independent inquiry it deems appropriate. If the court sustains the testator's allegations, the will would be declared valid and the original copy of the will would remain with the court.[159] While this declaration makes the will subject only to subsequent revocation, it does not protect the will from a contest brought by the testator's spouse and descendants. On the other hand, if the court finds for the defendants, it would be a conclusive determination of the will's invalidity.[160]

Draft B adopts an ex parte administrative approach.[161] Once the testator files an application and the original will, the court would appoint a special master to assist the court in making determinations regarding the due execution of the will. The master would interview the testator, the testator's family and friends, and conduct any investigation necessary to ascertain all relevant facts.[162] A written report, subject only to in camera inspection, would then be delivered to the court.

If necessary, the court would have the opportunity to conduct a hearing. This hearing would be closed, and because of its ex parte nature, prior notice would not be given to anyone except the testator and the witnesses. Family members and prospective heirs and beneficiaries would not be allowed to appear, thus ensuring the confidentiality and non-adversarial nature of the proceeding.[163] If the court is satisfied that the formalities for a valid will have been met, it would issue a written determination stating that the will was duly executed and is valid, subject only to the testator's subsequent withdrawal or revocation.[164] This determination of validity is

[155] UNIF. ANTE-MORTEM PROB. OF WILLS ACT § 1(a) (N.C.C.U.S.L., Draft A, Nov. 1980), *reprinted in,* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 194 (1990).

[156] *Id.* § 1(b).

[157] *Id.* § 1(c).

[158] *Id.* § 2(a).

[159] *Id.* § 3(a).

[160] *Id.* § 3(b).

[161] UNIF. ANTE-MORTEM PROB. OF WILLS ACT (N.C.C.U.S.L., Proposed Draft B, 1980), *reprinted in,* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 197 (1990).

[162] *Id.* § 2(a) & (b).

[163] *Id.* § 3.

[164] *Id.* § 4.

conclusive and binding on all persons. The only way a will admitted to ante-mortem probate under this procedure could be contested would be to allege that the testator subsequently revoked the will.

The Drafting Committee for the Uniform Ante-Mortem Probate of Wills Act failed to adopt either of these proposed drafts. Instead, it decided that a new draft should be developed to incorporate policy decisions made by the Committee which addressed various issues of concern including the strict description of a special master, court retention of the original will, and the binding effect of the decree.[165] Shortly thereafter, the Joint Editorial Board—Uniform Probate Code voted on whether or not to continue the ante-mortem project. Upon learning of the Board's lack of support, as evidenced by an evenly split vote, the Drafting Committee voted to cancel the project, eliminating any hope of a quick response to the need for uniform ante-mortem legislation.[166]

D. Current Status of Ante-Mortem Probate

1. The Original Three

In the waning years of the 1970s, three states enacted ante-mortem statutes based on the contest model: Arkansas, North Dakota, and Ohio. The remaining material in this section is reproduced from a 1997 article prepared by the Ante-Mortem Probate Subcommittee of the ACTEC State Laws Committee which conducted a detailed study of these statutes including surveys of ACTEC fellows and judges.[167]

a. North Dakota

The North Dakota Ante-Mortem Probate Act is a concise statute providing a simple method for the testator to obtain a judgment declaring that particular requirements for a valid will have been satisfied.[168] Matters for which a declaratory judgment may be obtained range from compliance with formalities, such as the testator's signature and the required number of witnesses and their signatures, to elements of testamentary capacity and freedom from undue influence.[169]

All of the beneficiaries named in the will, as well as presumptive intestate heirs, are necessary parties to the action.[170] To further solidify the standing of the testator's potential testate and intestate takers, the Act declares that these people have inchoate property rights. These parties must be served with process under the normal North Dakota Rules of Civil Procedure.[171]

If the court determines that the testator properly executed the will, had testamentary capacity, and was not unduly influenced, it declares that the will is valid and orders that it be filed.[172] A subsequent will or written revocation is insufficient to negate the ante-mortem probate; the testator must execute a new will and repeat the entire process to overcome the conclusive validity of the first will.[173]

The ante-mortem proceeding is for the limited purpose of determining the will's validity.[174] As a result, facts found in this proceeding are not admissible into evidence in any other action. In addition, the determination in the ante-mortem proceeding is binding on the parties to the action

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[165] Memorandum to JEB-UPC from R. V. Wellman 8 (Nov. 17, 1980).

[166] Letter from R. V. Wellman to James R. Wade (Oct. 12, 1981).

[167] See *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 ACTEC NOTES 83 (1997), which was prepared as part of the author's work as chair of the Ante-Mortem Probate Subcommittee of the State Laws Committee. Subcommittee members Marguerite Adams, David J. Estes, and Bruce A. Rosenfield made valuable contributions to this article.

[168] N.D. CENT. CODE §§ 30.08.1-01 to -04 (Supp. 1995).

[169] *Id.* § 30.1-08.1-01.

[170] *Id.* § 30.1-08.1-01.

[171] *Id.*

[172] *Id.* § 30.1-08.1-03.

[173] *Id.*

[174] *Id.* § 30.1-08.1-04.

only in litigation brought to determine the validity of a will; in all other cases, the same fact questions may be relitigated.[175]

Despite being the oldest modern ante-mortem probate statute, having been in effect for almost twenty years, the North Dakota provisions are rarely used. In a 1994 survey of ACTEC fellows and judges in the relevant jurisdictions,[176] only thirty percent of the responding North Dakota practitioners reported ever having been involved in an ante-mortem probate proceeding. Remarkably, the survey also showed that this thirty percent has somewhat aggressively utilized the procedure. One fellow reported participating in six ante-mortem proceedings and the average ante-mortem user was involved with over four proceedings each. Despite the fact that most respondents lacked significant experience with the technique, ninety percent agreed that the ante-mortem option enhanced the state's probate practice.

Respondents favorably received ante-mortem probate because the technique prevents will contests, creates certainty of a will's validity, and permits the testator and witnesses to testify when their memories are fresh. In fact, the only negative comment offered was that ante-mortem probate is seldom used. One fellow suggested that a provision should be added allowing an order to issue without a hearing if no one enters an objection to the ante-mortem probate proceeding.

The same survey revealed that North Dakota judges have very little experience with the ante-mortem process. Less than ten percent of the respondents had presided over an ante-mortem probate proceeding, and none of the judges who had ante-mortem probate experience had presided over more than one proceeding. Further, North Dakota judges seemed much less convinced of the beneficial nature of ante-mortem probate than their practicing counterparts. Only forty percent of the responding judges thought ante-mortem probate was beneficial; another forty percent felt it was not, and the remaining twenty percent was undecided. The main difference in opinion between the North Dakota bar and bench seems to center on the judges' concern that the process upsets potential beneficiaries and creates premature and, perhaps, unnecessary controversy.

b. Ohio

> [Note: This section discusses the prior Ohio statute which was replaced in 2019 by a considerably more comprehensive statute.]

The Ohio statutes that provide for an ante-mortem declaration of the validity of a will are the most detailed of the three states having ante-mortem legislation.[177] The substance of the Ohio provisions, like those of North Dakota, is basically an adoption of the contest model. However, the Ohio statute differs in its extensive procedural rules and in other important aspects. The most significant additions and changes made by the Ohio legislature to the North Dakota statute include: (1) detailed venue and service of process rules,[178] (2) comprehensive rules regarding the process of revoking or modifying a will which has been admitted to ante-mortem probate;[179] (3) a statement that non-use of ante-mortem probate is inadmissible as evidence or as an admission that the testator lacked testamentary capacity or was unduly influenced;[180] (4) the will and a declaration of its validity are filed in a sealed envelope only accessible to the testator — if removed, the declaration no longer has any effect;[181] and (5) the testator may modify or revoke the will using any method allowed under

[175] *Id.*

[176] Complete survey results are available from the author upon request.

[177] OHIO REV. CODE ANN. §§ 2107.081-.085 (Banks-Baldwin 1991).

[178] *Id.* § 2107.081-.082.

[179] *Id.* § 2107.084(C).

[180] *Id.* § 2107.081(B).

[181] *Id.* § 2107.084(B).

Ohio law; a new ante-mortem proceeding is not required.[182]

In addition to the greater amount of detail, the Ohio statutes have seen the greatest amount of use. Of the Ohio judges responding to the survey, over fifty percent had experience with ante-mortem probate proceedings. Additionally, the total number of ante-mortem cases involving fellows in Ohio far exceeded cases from the other two ante-mortem probate jurisdictions combined. The survey also revealed two main reasons why many attorneys and judges believe that ante-mortem probate may be beneficial. First, ante-mortem probate resolves the competency issue with the best evidence available and, second, it effectively prevents will contests. On the other hand, the primary reasons Ohio practitioners and judges disliked ante-mortem probate centered on the procedure's cost, its potentially cumbersome and complicated nature, and that subsequent modifications or changes to the will can defeat some of the benefits.

Only twenty-three percent of the responding Ohio fellows reported being involved with ante-mortem probate proceedings. Some of the reasons for this relatively infrequent use can be found among the comments of these practitioners:

- "The procedure unduly complicates changing the will."
- "It is too cumbersome and expensive for most clients. The required notices to interested parties kicks too many sleeping dogs."
- "Guarantees there will be a large amount of conflict in a client's life at a point in time when the client probably does not want it."

The Ohio ante-mortem statutes are also the only ones to generate appellate litigation subsequent to the declaratory judgment. In *Cooper v. Woodard*,[183] the Ohio court of appeals was confronted with an attack on the constitutionality of the ante-mortem provisions. Though the Ohio courts determined that there existed a justiciable controversy, the record of the case contained nothing to rebut the presumption of constitutionality. Therefore, the Ohio ante-mortem statutes were held to pass constitutional muster. Additionally, the court affirmed the lower court's refusal to entertain a motion regarding the interpretation of the will by stressing that the sole purpose of the ante-mortem proceeding is to determine the validity of a will.

Two later cases dealt with the admission of a will to ante-mortem probate under very specific circumstances. In *Fischer v. Green*,[184] the court held that even though the testatrix had previously been deemed so mentally incompetent that she needed a guardian, admission of her will to ante-mortem probate was proper. The testatrix's testamentary capacity was demonstrated to the satisfaction of the court because she knew she was executing a will, the objects of her bounty, and the nature of her property.

In the more recent case of *Horst v. First National Bank*,[185] the testator's disgruntled heirs brought a post-mortem action to set aside the will's declaration of validity. Despite the testator's testimony during the ante-mortem proceeding, which raised a legitimate question as to his capacity, the court held that the proper direct remedy is a timely appeal or a motion for new trial. Because the heirs had notice and failed either to appear at the ante-mortem proceeding or take advantage of the available direct remedies, and because a declaration of validity of a will is not subject to collateral attack, the trial court's dismissal was affirmed.

The *Horst* court also expressly approved a technique developed by Ohio practitioners which allows the testator to sidestep the requirement that all dispositive terms be revealed. Increased privacy is achieved by using a will which leaves everything to a separate trust, the terms of which

[182] *Id.* § 2107.084(D).

[183] 1983 WL 6566 (Ohio App.).

[184] No. 82-CA-71(Ohio App., Apr. 8, 1983).

[185] 1990 WL 94654 (Ohio App.).

are not disclosed in the ante-mortem proceeding. In this case, the court declared that there was "no legal error in the failure to serve the copy of the trust [and that] the service of a copy of the will was substantial compliance with the responsibilities explicit in the civil rules requiring notice."[186] Despite this case, however, the Ante-Mortem Probate Subcommittee envisions that contestants will continue to raise due process concerns by making forceful arguments that they need access to the terms of the trust to determine whether the testator had capacity or was subject to undue influence.

Despite the greater awareness of the ante-mortem probate provisions in Ohio and its relatively more frequent use, it nonetheless appears that the technique remains seldom used. The statute appears to be used most often when an attorney has prepared a will for a person who is under guardianship or who is elderly. Few applications are denied because lawyers usually pre-screen clients to determine if they are reasonably competent before attempting to use ante-mortem probate.[187] As one surveyed attorney put it, ante-mortem probate "gives another way to protect against a will contest ("bullet proof" a will), but is only useful (or used) when the testator is definitely competent."

c. Arkansas

In 1979, Arkansas became the third state to enact ante-mortem legislation.[188] Although the Arkansas Ante-Mortem Probate Act is closely modeled after the North Dakota provisions, several important changes were made. First, the Arkansas Act is more broadly phrased to permit declaratory judgments concerning the validity of the will rather than limiting the action to specific aspects of the will's validity.[189] Second, and perhaps of greater significance, the Arkansas Act permits will modification or revocation by subsequent will without requiring another ante-mortem proceeding.[190] However, the Arkansas Act does not address whether a revocation by physical act is permitted because the statute only applies to subsequently executed testamentary instruments. Third, the Arkansas Act does not prohibit findings of fact in ante-mortem actions from being used in other proceedings.[191]

The Arkansas Ante-Mortem Probate Act seems to be virtually ignored. Of the Arkansas fellows surveyed, only one out of the twenty-five who replied had participated in an ante-mortem probate proceeding. Despite this near non-use of the ante-mortem probate alternative, Arkansas fellows seem to have very definite and vocal opinions about the procedure. Sixty percent stated that ante-mortem probate is not beneficial, claiming that it violates the testator's privacy, upsets beneficiaries, creates controversy, and increases expenses. Thirty-five percent agreed that ante-mortem probate is beneficial to the state's probate practice, maintaining that it prevents will contests, creates certainty, and provides the testator with peace of mind. Only five percent had no opinion regarding the Act's impact on Arkansas probate practice.

The Arkansas judiciary, on the other hand, is significantly more undecided on the benefits of

[186] *Id.* at 3.

[187] Surveyed Ohio judges reported having been involved in 58 ante-mortem proceedings. In only 3 instances was the will denied admission to ante-mortem probate.

[188] ARK. CODE ANN. § 28-40-202 to -203 (Michie 1987).

[189] *Compare* ARK. CODE ANN. § 28-40-202(a) (Michie 1987) (declaratory judgment to establish validity of will) *with* N.D. CENT. CODE § 30.1-08.1-01 (Supp. 1995) (declaratory judgment permitted regarding the "signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will").

[190] *Compare* ARK. CODE ANN. § 28-40-203(b) (Michie 1987) *with* N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1995) (ante-mortem probated will remains binding unless new ante-mortem proceeding).

[191] *Compare* ARK. CODE ANN. § 28-40-203 (Michie 1987) (no limitation on use of court findings) *with* N.D. CENT. CODE § 30.1-08.1-04 (Supp. 1995) (findings of fact not admissible in other proceedings).

ante-mortem probate. Nearly eighty percent stated that they were not sure if ante-mortem probate is beneficial or not, and one judge indicated that he had never heard of the concept prior to the survey. None of the responding Arkansas judges had ever presided over an ante-mortem probate proceeding. As one judge stated, "the potential for benefit exists, but I have had no cases filed or resolved in my court." Another felt that because there is not "widespread knowledge in the bar of the statute," practitioners do not use it and therefore judges have no experience with the process.

2. The 2010s Resurgence

a. With Ante-Mortem Statutes

In 2010, Alaska reignited the interest in ante-mortem probate when it enacted the first ante-mortem probate legislation since the Arkansas statute.[192] Nevada considered comprehensive ante-mortem legislation in 2011 but it failed to pass. New Hampshire became the fifth state to authorize ante-mortem probate in 2014[193] with both Delaware[194] and North Carolina[195] following suit in 2015. Ohio made extensive revisions to its provisions in 2019.

Except for Delaware, the new states follow the contest model. Delaware requires the person who wishes to contest the will to bring a contest action within 120 days after being notified of the contest and receiving a copy of the will.[196]

b. With Declaratory Judgment Statutes

Two states, Nevada[197] and South Dakota, [198] permit ante-mortem probate by listing wills and trusts in their generic declaratory judgment statutes. South Dakota also has a statute permitting a settlor to file a petition to validate an inter vivos trust.[199]

3. Expansion to Other Documents

a. Trusts

Many of the modern statutes also permit settlors to validate inter vivos trusts prior to death. States which permit pre-death validation include Alaska,[200] Delaware,[201] Nevada,[202] New Hampshire,[203] Ohio,[204] and South Dakota.[205]

b. Powers of Appointment

Two states, Delaware[206] and Nevada,[207] also permit a pre-mortem validation proceeding for a person who holds or exercises a power of appointment.

E. State Statutes Analyzed

a. Standing

Among the nine jurisdictions permitting ante-mortem probate, or pre-death validation by declaratory judgment, Arkansas[208], Delaware[209], Nevada[210], North Dakota[211], and Ohio[212]

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[192] ALASKA STAT. § 13.12.530-.590 (also providing for the validation of a trust during the settlor's lifetime). See also Joseph Savoie, *The Commissioners' Model of Ante-Mortem Probate* (2011) [unpublished manuscript on file with author].

[193] N.H. REV. STAT. § 564-B:4-406(d).

[194] 12 DEL. C. § 1311.

[195] N.C. GEN. STAT. § 28A-2B-1.

[196] 12 DEL C. § 1311(b).

[197] NEV. REV. STAT. § 30.040 provides that the testator or settlor "may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status or other legal relations."

[198] S.D CODIFIED LAWS § 21-24-3.

[199] S.D CODIFIED LAWS § 55-4-57.

[200] ALASKA STAT. § 13.12.535-.590.

[201] 12 DEL. C. § 3546(a).

[202] NEV. REV. STAT. § 30.040.

[203] N.H. REV. STAT. § 564-B:4-406(d).

[204] OHIO REV. CODE § 5817.10.

[205] S.D. CODIFIED LAWS § 55-4-57.

[206] 12 DEL. C § 1312.

[207] NEV. REV. STAT. § 30.040(2).

[208] ARK. CODE § 28-40-202(a).

[209] 12 DEL. C. § 1311(b).

[210] NEV. REV. STAT. § 30.040(2).

[211] N.D. CENT. CODE § 30.1-08.0-01.

provide that only the testator can bring the action. Ohio's statute makes this requirement clearer by clarifying that the right is personal to the testator and that it may not be exercised by the testator's guardian or an agent under the testator's power of attorney.[213]

Alaska's statute allows for the testator, a person nominated in the will to serve as a personal representative, or, with the testator's consent, any interested party to bring an ante-mortem action.[214]

North Carolina and New Hampshire both include residency requirements. North Carolina[215] requires that the testator be a resident of the state. New Hampshire[216] allows a testator to bring an ante-mortem action if the testator is domiciled in the state or owns real property within the state. For a trust validation, however, only a settlor has standing to bring the action.[217]

South Dakota's[218] statute allows any interested party to seek a declaratory action for validation of a will. With regard to trusts, however, only a trustee, trust advisor, trust protector or the settlor herself may petition the court for determination of the trust's validity.[219]

Most states requires a nexus between the testator and the state such as being a domiciliary, resident, or owning real property in the state. Alaska, on the other hand, does not require any type of nexus to use its ante-mortem procedure.

b. Revocation

The declaration of the validity of a will or trust does not bar later revocation or modification in most states. Alaska[220], Arkansas[221], Delaware[222], New Hampshire[223], and Ohio[224] permit modification or revocation without the need for another proceeding.

North Carolina leaves the possibility for a revocation or modification up to the discretion of the court. The statute provides that the court may order that the will or codicil not be revoked and that no subsequent will or codicil be valid unless validated through another proceeding.[225]

North Dakota requires the testator to bring a new ante-mortem proceeding to revoke or modify a will which the court has validated through its ante-mortem proceeding.[226] The new proceeding must include the parties relevant to the old will as well as the new will.

c. Effect After Death

The normal benefit of ante-mortem probate is to make the will incontestable after the testator's death. However, North Carolina permits a party to show "by clear and convincing evidence, that before and during the hearing, the [testator] was subject to financial or physical duress or coercion which was so significant that the [testator] would not have reasonably disclosed it at the hearing" and then ask the court for permission to contest the will.[227]

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[212] OHIO REV. CODE § 5817.02.

[213] *Id.*

[214] ALASKA STAT. § 13.12.530.

[215] N.C. GEN. STAT. § 28A-2B-1(a).

[216] N.H. REV. STAT. § 552:18.

[217] *Id.* § 564-B:4-406.

[218] S.D. CODIFIED LAWS § 21-24-3.

[219] *Id.* § 55-4-57(g).

[220] ALASKA STAT. § 13.12.575.

[221] ARK. CODE § 28-40-203(b).

[222] 12 DEL. C. § 1311.

[223] N.H. REV. STAT. §§ 552:18, 564-B:4-406.

[224] OHIO REV. CODE §§ 5817.12(A)-(C), 5817.13(A)-(C).

[225] N.C. GEN. STAT. § 28A-2B-4(b).

[226] N.D. CENT. CODE § 30.1-08.0-03.

[227] N.C. GEN. STAT. § 28A-2B-4(a). For an analysis the statute concluding that "[t]his possibility should not exist, see Kyle Frizzelle, *Better to Play Dead? Examining North Carolina's Living Probate Law and Its Potential Effect on Testamentary Disposition*, 39 CAMPBELL L. REV. 187 (2017).

d. Waiver of Physician-Patient Privilege

Ohio is currently the only state to require an express written waiver of the testator's physician-patient privilege.[228] The testator must file the wavier with the complaint. This is consistent with the statutory waiver of physician-patient privilege in a post death contest.[229]

e. Other Proceedings

Five states, Delaware[230], New Hampshire[231], North Carolina[232], North Dakota[233], and Ohio[234] prohibit a testator's nonuse of the ante-mortem procedure to be used as evidence in other proceedings. The remaining state's statutes do not specify whether such failure may be used in other proceedings or as evidence of an admission that the will is not valid.

f. Confidentiality

Confidentiality is specifically addressed by Alaska and North Carolina. Alaska[235] provides that only the notice of filing, the summary of formal proceedings, the dispositional order or modification/termination order be available. All other information contained in the records are confidential. The records may be made available only to the petitioner and petitioner's attorney, interested persons (and their attorneys, guardians, and conservators), the judge hearing or reviewing the matter, and clerical and administration staff.[236] North Carolina[237] allows for a party to the proceeding to move to have the file sealed and kept confidential. Only the petitioner named in the petition, the attorney for the petitioner, or a court of competent jurisdiction may view the contents of the file without an order.[238]

Both statutes include a good cause shown provision which allows for the court to order the records be made available to a person not listed in the statute.

g. Inchoate Property Rights

A few states deem beneficiaries possessed of inchoate property rights. These states include Arkansas,[239] New Hampshire,[240] and North Dakota.[241]

F. Concerns with Ante-mortem Probate

The use of ante-mortem probate, while not the best choice for all testators, provides anxious testators with at least three significant interrelated benefits which are not available under post-mortem processes and which are well worth the up-front costs. Included with these benefits are welcome side effects such as the reduction of court time and the preservation of estate resources that otherwise might be wasted in defending post-mortem will contests brought on artificial grounds. Despite these benefits, the practitioner must remember that there are also significant drawbacks to be weighed against these benefits when making the decision to use ante-mortem probate. The psychological effects on the testator and the testator's family associated with disclosure of the contents of the will or the potential embarrassment and conflict that may occur if the testator's mental capacity is litigated are prime considerations. Additionally, presumptive heirs who genuinely believe that the testator lacks capacity or is being unduly influenced may be hesitant to contest while the testator is still living.

[228] OHIO REV. CODE §§ 5817.02(D), 5817.03(D).

[229] *Id.*

[230] 12 DEL. C. § 1311(d).

[231] N.H. REV. STAT. § 552:18(IX).

[232] N.C. GEN. STAT. § 28A-2B-1(c).

[233] N.D. CENT. CODE § 30.1-08.1-04.

[234] OHIO REV. CODE §§ 5817.02(C), 5817.14(A)-(C), 5817.03(C), 5817.14(D).

[235] ALASKA STAT. § 13.12.585(a)-(c).

[236] *Id.*

[237] N.C. GEN. STAT. § 28A-2B-5.

[238] *Id.*

[239] ARK. CODE § 28-40-202(c).

[240] N.H. REV. STAT. §§ 552:18(IV), 564-B:4-406(D)(4).

[241] N.D. CENT. CODE § 30.1-08.1-02.

Reluctance on the part of the testator to reveal the contents of the will and the potential psychological effects of this disclosure may be avoided using a pour-over will and a separate trust agreement which allows a testator to seek the benefits of ante-mortem probate while ultimately escaping the requirement that all dispositive terms be revealed. The testator's will is validated through ante-mortem probate, however, the terms of the will leave the entire estate to the trust, the terms of which are not disclosed in the proceeding.[242] Thus, the will is declared valid, the ultimate disposition of property is kept secret, and the testator's disposition plan protected. In addition, the testator can easily make changes to the trust, and those changes will impact the final disposition of the testator's property without the necessity of an additional ante-mortem proceeding. To enhance the effectiveness of this technique, the will should expressly incorporate the trust by reference. The ante-mortem probate is likely to make the trust incontestable as well even though the terms of the trust were not disclosed during the ante-mortem proceeding.[243]

From a legal standpoint, questions may be raised concerning the binding effect of a court's declaration that the testator's will is valid. Problems may arise due to claims based on the maxim that "the living have no heirs" or that even if such persons could be reasonably identified at the time of the ante-mortem probate proceeding, they may not be the same as the actual heirs when the testator dies. Another potential problem involves a posthumous challenge on the ground that the testator was, after the declaratory judgment, subject to undue influence which prevented the testator from revoking the will. There is also the chance that ante-mortem probate will raise due process issues if the notice requirements are not carefully drafted and followed.

A final item which estate planners must consider is the fact that while evidence that the testator failed to use ante-mortem probate is generally not admissible in a proceeding to invalidate the will, evidence that the attorney did not inform the testator of the option to use ante-mortem probate may be admissible against the attorney in a malpractice action. In the states where lack of privity between the attorney and estate beneficiaries remains a bar to an attorney's liability to third parties, malpractice liability is not a concern in this situation. However, in states where privity is not a bar to third party litigation, the risk is magnified, as either the personal representative or the beneficiaries may bring a malpractice action. For this reason, practitioners must be aware of ante-mortem probate, explain this option to their clients, especially when a contest is likely, and then document the fact that the client was informed of and refused to use ante-mortem probate.

G. Conclusion

Ante-mortem probate provides testators with the means of bestowing total invincibility to their wills. This protection, however, comes at a price which has both financial and emotional components. Thus, each testator in states authorizing this technique must carefully consider the advantages and drawbacks of ante-mortem probate to determine whether a judgment declaring the will's validity fits his or her individual needs. In situations where a will contest seems all but inevitable, having the will declared valid before the testator's death will provide the testator with certainty and peace of mind that may very well be worth the up-front financial cost and possible emotional strain.

[242] *See* Horst v. First Nat'l Bank, 1990 WL 94654 (Ohio App.) (heirs claimed that failure to attach copy of inter vivos trust to the declaratory judgment along with the will was fatal error; court found no legal error and stated that inclusion of a copy of the will was substantial compliance).

[243] *See* Hageman v. Cleveland Trust Co., 45 Ohio St. 2d 178, 343 N.E. 2d 121, 124 (1976) (holding that "even if a valid trust were not established by decedent's trust agreement, the trust agreement document is incorporated by reference into the will").

KNOXVILLE ESTATE PLANNING COUNCIL

ANTICIPATING WILL CONTESTS AND HOW TO AVOID THEM

Dr. Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

1

Cheap Funerals

- In which state are funerals the cheapest?

2

2

Most Complex Probate

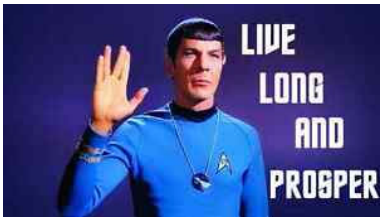
- In which state is probate the most complex?

3

3

Longest Life Expectancy

- Which state has the longest life expectancy at over 81 years?



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Will Contests Generally

- Rare
  - Less than 5% of wills are contested.
- But, you must be on guard for contest-likely situations and plan accordingly.

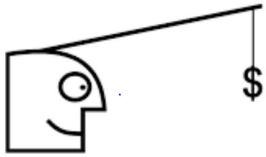
PREVENTION WORKS!

5

5

Incentive to Contest

- Whenever a person would take more either:
  - Under intestacy, or
  - Under a prior will.



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Reasons to Anticipate Will Contest

- 1. Exclusion of natural objects of bounty

7

7

Reasons to Anticipate Will Contest

- 2. Unequal treatment of children

8

8

Reasons to Anticipate Will Contest

- 3. Sudden or significant change in disposition plan

9

9

Reasons to Anticipate Will Contest

- 4. Excessive restrictions on gifts to beneficiaries who are also heirs

10

10

Reasons to Anticipate Will Contest

- 5. Elderly or disabled testator

11

11

Reasons to Anticipate Will Contest

- 6. Testator who behaves strangely

12

12

Techniques – The "Tool Box"

- 1. Include *in terrorem* (no-contest) (forfeiture) provision
  - Beneficiary who contests and loses forfeits testamentary gift.
  - Tennessee:
    - Enforceable.
    - Good faith/probable cause exception.
    - Testator cannot remove exception.
    - *Tate v. Camp*, 245 S.W. 839, 842 (Tenn. 1922).
    - *Winningham v. Winningham*, 966 S.W. 2d 48 (Tenn. 1998).

13

13

Techniques – The "Tool Box"

- 1. Include *in terrorem* (no contest) (forfeiture) provision
  - Drafting guidelines:
    - Create substantial risk

14

14

Techniques – The "Tool Box"

- 1. Include *in terrorem* (no contest) (forfeiture) provision
  - Drafting guidelines:
    - Create substantial risk
    - Indicate beneficiary of forfeited property

15

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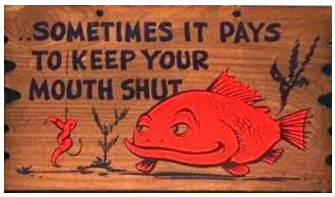
Techniques – The "Tool Box"

- 2. Do not explain reasons for property disposition.



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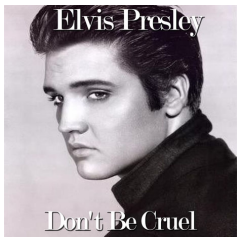
Techniques – The "Tool Box"

- 3. Avoid bitter or hateful language.



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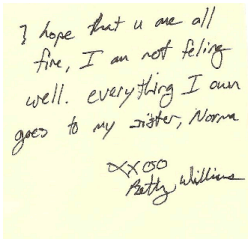
Techniques – The "Tool Box"

- 4. Use holographic "back up" will.


I hope that u are all fine, I am not feling well. everything I own goes to my sister, Norma
XXOO
Patty Williams

18

18

Techniques – The "Tool Box"

- 5. Enhance will execution ceremony.

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Will Execution Ceremony -- Purposes

- Psychological benefits

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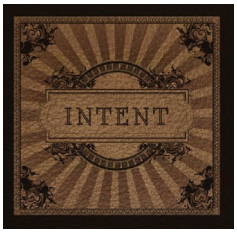
Will Execution Ceremony -- Purposes

- Effectuate client's intent



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Will Execution Ceremony -- Purposes

- Limit exposure to malpractice claims

22

22

Will Execution Ceremony Steps Before

- Proofread will carefully
  - "I leave $10.000 to Barry Allen."
  - "I enjoyed cooking my friends and my children."
  - The texting lookout:
    - "The police are now here."
    - "The police are nowhere."

23

23

Will Execution Ceremony Steps Before

- Assure internal integration to avoid fraudulent page insertion or removal.
  - Same type, size color, etc. of paper.
  - Same font styles.
  - Same darkness of toner/ink.
  - Ex toto pagination (page x of y).
  - Avoid blank spaces.

24

24

Will Execution Ceremony Steps Before

- Review will with client
  - Consider reward if client finds errors (either real ones or ones you inserted as a test).

25

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Will Execution Ceremony Steps Before

- Explain ceremony to client

26

26

Will Execution Ceremony The ceremony itself

- Select proper location

27

27

Will Execution Ceremony
The ceremony itself

- Seat participants strategically

28

28

Will Execution Ceremony
The ceremony itself

- Conduct ceremony complying with state law requirements for a valid will.
  - Satisfy publication requirements.
    - Do witnesses need to know document is a will?
  - Satisfy presence requirements.
    - Testator signs in witnesses presence.
    - Witnesses attest in testator's presence.
    - Witnesses attest in each other's presence.

29

29

Will Execution Ceremony
The ceremony itself

- Ceremony basics
  - Ask questions to establish capacity (if needed).
  - Ask questions to establish intent.
  - Testator/Testatrix initials each page and signs at end.
  - Witnesses initial each page and attest.
  - Notary completes self-proving affidavit.

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Will Execution Ceremony After ceremony

- Discuss safekeeping of will
  - Attorney?
  - Client?
  - Third party?
  - Depends on client's situation?
- Regardless, give or obtain receipt.

31

31

Will Execution Ceremony After ceremony

- Provide post-will instructions
  - Avoid self-help changes.
  - Update will when situation changes:
    - Divorce
    - Births
    - Deaths
    - Change in feelings about included and excluded relatives
    - Change in composition or value of estate
    - Change in tax laws

32

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Techniques – The "Tool Box"

- 6. Video-record will execution ceremony

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Techniques – The "Tool Box"

- 6. Video-record will execution ceremony
  - Potential benefits
    - Accurate
    - Preserves otherwise unavailable evidence:
      - Tone of voice
      - Demeanor
      - Gestures
    - Psychological benefit to testator

34

34

Techniques – The "Tool Box"

- 6. Video-record will execution ceremony
  - Potential Disadvantages
    - Not wish to expose testator to judge or jury
    - Difficulty if recording turns out bad
    - Alteration
    - Inadvertent destruction
    - Malpractice liability for not making recording
    - Unable to play

35

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Techniques – The "Tool Box"

- 7. Select witnesses thoughtfully

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Techniques – The "Tool Box"

- 7. Select witnesses thoughtfully
  - Witnesses familiar with testator
  - Supernumerary witness
  - Young and heathy witnesses
  - Traceable witnesses
  - Witnesses who would favorably impress judge and jury

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Techniques – The "Tool Box"

- 8. Obtain affidavits of individuals familiar with testator.

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Techniques – The "Tool Box"

- 9. Document transactions with testator verifying intent.

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Techniques – The "Tool Box"

- 10. "Coincidental" Doctor Appointment

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Techniques – The "Tool Box"

- 11. Obtain other evidence to document testator's actions

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Techniques – The "Tool Box"

- 12. Preserve prior will if better than intestacy.

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42

Techniques – The "Tool Box"

- 13. Reexecute same will on regular basis.

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Techniques – The "Tool Box"

- 14. Consider a more "traditional" disposition

44

44

Techniques – The "Tool Box"

- 15. "Trick" disinherited potential heir with inter vivos gift on same day as will execution.

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Techniques – The "Tool Box"

- 16. "Buy off" disinherited potential heir with a contract not to contest

46

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Techniques – The "Tool Box"

- 17. Use non-probate techniques.

47

47

Techniques – The "Tool Box"

- 18. Ante-Mortem Probate
  - Basic idea
    - Obtain declaratory judgment while testator is alive that will is valid.
    - Thus, cannot contest after testator dies.

48

48

Techniques – The "Tool Box"

- 18. Ante-Mortem Probate
  - Status
    - Allowed in Alaska, Arkansas, Delaware, Nevada, New Hampshire, North Dakota, Ohio, and South Dakota.
    - Also authorized in North Carolina BUT can be contested after the testator dies.

49

49

Techniques – The "Tool Box"

- 18. Ante-Mortem Probate
  - Advantages:
    - Testator available for observation and to testify.
    - Reduces will contests.
    - Carries out testator's intent.

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Techniques – The "Tool Box"

- 18. Ante-Mortem Probate
  - Disadvantages:
    - Disruptive to family.
    - Contents of will revealed.
    - Potential for testator embarrassment, especially if court determines testator lacks capacity.
    - Cost.

51

51

Techniques – The "Tool Box"

- 18. Ante-Mortem Probate
  - Change domicile to take advantage of procedure?

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Questions?

53

53