PacificCPE

COURSE
40753A

Executor Essentials: Interpreting Wills, Provisions, Ambiguities, and Legal Limits

A will is the foundation of the probate process, but understanding what it actually requires can be surprisingly complex. This course focuses on how to read and apply will provisions, covering common drafting issues, conditions on bequests, and situations where professional guidance is essential. For CPAs and tax professionals involved in estate administration, this course builds the working knowledge needed to recognize when a will's terms affect asset distribution, tax planning, or fiduciary decisions—and when an attorney must be consulted.

CREDIT HOURS 2 | FIELD OF STUDY BUSINESS | EXAM QUESTIONS 10

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Assignment

- Study the full course materials included here.
- Complete the review questions after each chapter.
- Answer 10 final exam questions.
- Final exam is scored immediately, 70% or better passes.
- Certificate of completion is available in your account.
- Failed exams can be retaken free of charge.

Course Objectives

- Recognize examples of property that can be legally passed through a will.

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Chapter 1: MAKING SENSE OF THE WILL

Chapter Objective

After completing this chapter, you should be able to:

- Recognize examples of property that can be legally passed through a will.

In novels and movies, when anxious family members gather in a somber office to hear an even more somber lawyer read the terms of a will, it's a moment of high drama. In real life, it's usually considerably less tense. One reason is that today many valuable assets, including retirement accounts, insurance policies, many bank accounts and securities, and property held in living trusts don't pass under the terms of a will.

But a will can still be important, and it might contain surprises or, at the very least, some language that's hard to understand. This chapter explains how to figure out what the will means.

DOES THE WILL APPEAR VALID?

Before you start deciphering the language of the will, take a moment to arrive at a tentative conclusion about the document's validity. The final word on validity will be issued by the probate court if you go through formal probate proceedings. But it's good to be confident that the will is a legally binding document before you begin following its instructions.

That said, it's also important to understand that:

- Family changes—for example, the will maker's divorce or marriage—can have dramatic legal effects on the terms of a valid will. (See "Events That Affect Who Inherits," below.)
- No will can dispose of property that's held in joint tenancy or in a living trust, or for which a beneficiary has been named in another binding document (except in Washington state; see below).
- Even a will that's properly signed and witnessed might be open to challenge—for example, on the ground that the will maker didn't have the mental capacity, perhaps because of dementia or another illness, to make a valid will. (See Chapter 3 of course 40758B.)

Basic Requirements

Generally, to be legally binding a will must meet three requirements, all intended to protect against fraud or forgery. It must be:

- In writing

- Signed and dated by the person who made it, and
- Signed by witnesses.

If a will seems to have been properly signed and witnessed, chances are all is well. You have no responsibility to investigate the circumstances of the will's signing unless someone suggests a problem exists.

The major exception to these rules is that in about half the states, a handwritten, unwitnessed, but signed will is valid if it's clear that it really was intended to be a will. See "Handwritten Wills" a little later in this chapter.

For now, we'll walk through the usual requirements one by one.

Writing

These days most wills are generated on computers and printed out; older wills were generally typewritten. It's permissible, however, for a will to be entirely handwritten as long as the signature and witnessing requirements (discussed below) are met.

What is troublesome, legally, is a mix of machine-generated printing and handwriting. For example, if something on a typed document is crossed out or added by hand, it's impossible to tell whether the change was made before or after the document was signed—or even who made it.

In some states, wills in electronic form are valid if they meet additional requirements. See "Electronic Wills," below.

Tip

Handle minor, noncontroversial problems yourself, if possible. A minor handwritten change, that all inheritors agree to—for example, a note added to an existing will after a grandchild is born, leaving the new baby $1,000—is not likely to be a problem. The inheritors can probably figure out a way to honor the wish, even though they are not legally bound to do so. But if the change is major and likely to cause disagreement—for example, removing a beneficiary entirely—see a lawyer.

Signature and Date

The person who wrote the will (the "testator") must have signed and dated it at the end of the document. If a will maker who wasn't physically able to sign directed someone to sign on their behalf in front of witnesses, that counts as a valid signature.

The signature does not have to be notarized. (However, you'll often see a notarized statement, called a self-proving affidavit, attached to the will. This document speeds up the probate process, but it's

not necessary. Self-proving affidavits are discussed in more detail later in this chapter.) It's also common, but not legally required, for the person to have initialed each numbered page of the will.

If a will was not signed, in some circumstances a court will accept the will if clear and convincing evidence exists that the person intended the document to be their will. See "Documents Meant to Serve as Wills," below.

Witnesses

As a protection against fraud, almost every state requires that two witnesses, as well as the will maker, sign the will. (Again, certain unwitnessed handwritten wills are valid in some states. See "Handwritten Wills," below.) In Colorado and North Dakota, however, a will is valid if it is either witnessed or notarized. (Colo. Rev. Stat. § 15-11-502; N.D. Cent. Code § 30.1-08-02.)

Some states also specify that the witnesses must sign the will in the presence of the will maker or at the same time, or both. States can vary in the exact witnessing procedure required, and if the witnessing requirements were not met, the probate court judge will decide whether to admit the will to probate. Keep in mind that judges take these rules quite seriously.

Example 1

The two people who signed the will of a bedridden woman went into the woman's living room, where she lay, and heard her say that the document was her will and that she wanted them to act as witnesses. Then they went out on the porch of her home to actually sign the document. The will was challenged, and the New Hampshire Supreme Court invalidated it because the witnesses had not been in the same room with the will maker when they signed her will. (In re Estate of Fischer, 886 A.2d 996 (N.H. 2005).)

Example 2

On a video monitor, witnesses watched a woman sign her will on a different floor of the house. The will maker couldn't see or hear the witnesses sign her will. An Ohio court ruled that the witnesses were not in the "conscious presence" of the will maker, as was required by the law in effect at the time. (Whitacre v. Crowe, 972 N.E.2d 659 (Ohio Ct. App. 2012).)

On the other hand, judges don't want a technical mistake to frustrate a will maker's obvious intentions. So if no one is arguing about the validity of a will, but there was a failure to comply with witnessing laws, generally a judge will look for ways to get around the problem.

Example

A lawyer who prepared wills for a married couple forgot to sign the wife's will as a witness. He discovered the mistake after her death and signed the will then. A court ruled that the will was valid because the lawyer had watched the will maker sign her will and state law did not require him to sign it at the same time. (Estate of Eugene, 104 Cal. App.4th 907 (2002).)

Knowledge of Witnesses

The witnesses don't need to have read the will, but they need to have known that the document they watched being signed was a will.

Example

The Mississippi Supreme Court ruled that a will was invalid because even though the witnesses who signed it watched the testator sign the will, they didn't know what the document was. They had been asked only to "witness something." The notary public told them where to sign, but no one told them the document was a will. (Estate of *Griffith v. Griffith*, 30 So.3d 1190 (Miss. 2010).)

At the end of the will, you should find a statement (called a witness "attestation") that looks something like this:

> We hereby certify that in our presence on the date written above CYNTHIA B. GONZALES signed the foregoing instrument and declared it to be her Last Will and Testament and that at her request in her presence and in the presence of each other we have signed our names below as witnesses.
>
> Richard E. Garcia residing at 548 Founder Street, Reno, Nevada
>
> Ramona S. Curry residing at 91 Margaret Avenue, Reno, Nevada

Age of Witnesses

The general rule is that witnesses must be legal adults—that is, 18 years or older. If a will was signed by the required two witnesses, but one of them was not yet 18, the will is invalid.

Witnesses Who Inherit Under the Will

In most states, someone who stands to inherit property under a will cannot be a witness to it. In these states, if a beneficiary does sign the will as a witness, and not enough other "disinterested"

witnesses signed, the general rule is that the gift to the witness is canceled. The rest of the will remains valid.

For example, in Massachusetts, if a beneficiary—or a beneficiary's spouse—serves as a witness, then the gift to the witness is void. (Mass. Gen. Laws Ann. 190B § 2-505.)

Other states soften this rule somewhat. For example, New York law provides that if a beneficiary is also a witness, then the gift to that person is void. If, however, the beneficiary would have been entitled to inherit under state law if there had been no will, the beneficiary does get at least some of the bequest, up to the amount the beneficiary would have gotten had there not been a will. (N.Y. Est., Powers & Trusts Law § 3-3.2.) Illinois has a law that is similar but even broader; it applies if a beneficiary's spouse was a witness. (755 Ill. Comp. Stat. Ann. § 5/4-6.)

If you want to look up your state's law on witnesses, see Appendix B.

Notaries as Witnesses

For the most part, wills don't need to be notarized. (In Colorado and North Dakota, the two states that allow you to notarize your will in place of witnesses, though, *notarization* is required if you don't have witnesses.) Even when it's not required, some people get wills notarized anyway. Sometimes, if there's a dispute over witnessing, the notary public counts as a competent witness. For example, if only one person signed as a witness (or one witness was disqualified) but the will was notarized, the notary would be counted as the second witness.

Lawyers as Witnesses

Normally, it's not a problem if the attorney who drafted the will also serves as a witness. This is true even if the attorney is appointed executor and so stands to benefit from the will—by collecting fees for serving as executor.

Remote Witnesses

During the COVID-19 pandemic, many states temporarily relaxed the witnessing requirements for wills and allowed remote witnessing—where witnesses watch the will maker sign the will in real time using audiovisual communication. Most of these temporary emergency measures have now expired (but a will witnessed remotely while the laws were in effect will still be valid, even though the law might no longer be in force for current wills). A few states have followed up by passing permanent remote witnessing laws. As discussed in the next section, several states have also passed more comprehensive laws allowing electronic wills, and some of these laws also explicitly allow remote witnessing. If your loved one used remote witnesses, you might want to find out more about the specifics of your state's laws or, if applicable, the temporary authorizations in place at the time the will was made.

Electronic Wills

Several states allow electronic wills, or e-wills, which are wills that are kept in electronic form. State laws addressing electronic wills vary widely; for example, some allow the witnesses to be present at the will signing remotely (using audiovisual technology), while other states still require witnesses to be physically present. A few states have also imposed electronic storage requirements that are so stringent that very few people, if any, have been able to make electronic wills under those laws.

To see whether your state allowed electronic wills as of the publication of this edition, see Appendix A. But note that this area of law is developing rapidly, and more states are jumping on board each year. Even without a state law explicitly allowing e-wills, however, a few courts have accepted wills signed not with pen and ink but on computer.

For example, a Tennessee man wrote a one-page will on his computer, asked two neighbors to witness his signature, and then, in their presence, added a cursive version of his signature before printing out the document. The witnesses then signed the paper. Under state law, the court ruled, a signature included any "symbol or methodology" used by a person with the intent of authenticating a document. (*Taylor v. Holt*, 134 S.W.3d 830 (Tenn. App. 2003), appeal denied (2004).)

Similarly, an Ohio court accepted a will that had been signed on a tablet computer and later printed out. The will maker's brothers, who had been with him in the hospital when he wrote his wishes on the tablet, witnessed his signature and said they simply hadn't had pen or paper. The judge said the document met the definition of a will under state law. ("Judge rules that a will written and signed on tablet is legal," Ohio *Chronicle-Telegram*, June 25, 2013.)

In 2018, a Michigan appeals court accepted an even more informal electronic document as a will. Shortly before his death, a man left a farewell note on his phone, including instructions for what was to happen to his property. The court ruled that it was clear that the man had intended this document to function as a will. (*In re Estate of Horton*, 325 Mich. App. 325 (2018), rev. den. 503 Mich. 1018 (2019).)

Out-of-State Wills

You might find a will that was signed in a different state from the one in which the person was living at the time of death. This shouldn't be a problem. Generally, a will's validity is judged under the old state's laws. In other words, if the will was valid under the laws of the state where it was signed, the new state will accept it as valid.

Handwritten Wills

You might, however, find a handwritten will that was not signed by witnesses. It's not common, but sometimes people simply write down their instructions, sign the piece of paper, and hope for the best. Such "holographic" wills are legal in about half the states if they are signed by the will maker and all important provisions are in the writer's handwriting. Some states require that they also be dated. (To see whether your state allows holographic wills, check Appendix A.)

What about a preprinted will form, on which the will maker has filled in blanks in handwriting? Some courts have considered these documents, when unwitnessed, to be holographic wills. Some haven't. For example, a New Jersey court ruled that even though everyone agreed that the deceased man had filled in the blanks and intended the document to be his will, state law required all important provisions to be in the will writer's handwriting—and important provisions of this document were preprinted. (*In re Will of Ferree*, 369 N.J. Super. 1, 848 A.2d 1 (2004).)

Even in many states that don't allow holographic wills, a will that was a valid holographic will when it was made in another state will be considered valid. Holographic wills provide fertile ground for arguments. Is that really the deceased person's handwriting? Was the person of sound mind when writing it? Did the person really intend it to be a will? And if so, was the purpose to revoke a previous witnessed will or add to it? Is it actually signed?

One court ruled that a woman's instructions for the disposition of her property, written in a notebook, weren't signed because her name appeared only in the front of the notebook, not at the end. (*Kidd v. Gunter*, 262 Va. 442, 551 S.E.2d 646 (Va. 2001).)

Documents Meant to Serve as Wills

In unusual circumstances, a court might even accept a document that wasn't signed and witnessed like a formal will, and does not qualify as a signed holographic will.

The court can accept the document for probate if there is "clear and convincing" evidence that the document was intended to serve as the person's will. That means someone must go to court, after a death, and try to prove that the deceased person meant the document to serve as a will. If the court decides the evidence is clear and convincing, then it can treat the document like a will, even though it wasn't signed or witnessed.

In one unusual case, a cardboard panel from a cigarette carton, labeled "First and Last Only Will" and "Draft?" was submitted to a probate court in Pennsylvania. After eight years of litigation, a court determined that it was not a valid will because it did not clearly show that the writer had intended it as his will. (*In re Estate of Shelly*, 950 A.2d 1021 (Pa. Super. Ct. 2008).)

Similarly, a New Jersey court refused to admit an unsigned draft of a will even though it was made by the person's lawyer and reflected her wishes just one hour before her death, because there was not "clear and convincing evidence" that the deceased person had intended the document to be her will. The court reasoned that she hadn't reviewed the draft and given her approval. (In re Probate of Will and Codicil of *Macool*, 416 N.J. Super. 298, 311 (App. Div. 2010).)