The Basics of a Texas Will

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

Impact of changes between will execution and death
- Property
- Persons

Will revocation
Basic Elements of a Valid Will

- 1. Legal Capacity
- 2. Testamentary Capacity
- 3. Testamentary Intent
- 4. Formalities
1. Legal Capacity
Legal Capacity

1. 18 years old or older.
2. Is or has been lawfully married.
3. Is a member of the armed forces at time of will execution.
2. Testamentary Capacity

“sound mind”
1. Understand what doing
Elements of Testamentary Capacity

3. Know general nature and extent of property.
4. Know natural objects of bounty.
5. Achieve above four elements simultaneously.
3. Testamentary Intent
“Intent” not “in tent”
Testator must intend the very instrument the testator executes to be the will.
4. Formalities

Attested (witnessed)

Holographic (handwritten)
4. Formalities – Attested Will

Written

Signed

Witnessed
1. In Writing

- No requirement regarding what written on or with.

> Rory,
You REMEMBER each and every day how much your Daddy Loves you. I'm going to be with Grandma George and your mom. We will be with you always. Always be
MADeden proud.
2. Signed by Testator

- Any symbol executed or adopted by the testator with present intent to authenticate the will.
3. Attestation

- Number = at least two
Capacity of Witnesses

- Legal Capacity
  - Above 14
Capacity of Witnesses

- Attestation Capacity
  - Credible; qualified to testify in court
4. Knowledge

Publication not required (witnesses do not need to know they are witnessing a will)
1. Witnesses attest in presence of testator?
   - Required in Texas.
2. Witnesses attest in each other’s presence?

- Not required in Texas.
3. Testator signs (or acknowledges a prior signature) in presence of witnesses?

- Not required in Texas.
1. Effect on will

- None – will remains valid.
Witness as Beneficiary

- 2. Effect on beneficiary’s gift
  - Void, unless an exception applies.
3. Exceptions

   a. If beneficiary is also an heir, beneficiary receives smaller of will and intestate share.
   b. Will is otherwise established (e.g., another witness).
   c. Corroboration by disinterested and credible person.
Substitutes for in-court testimony of witnesses when will probated.

Saves time, expense, and inconvenience when probating will.

Does not “strengthen” the will.
1. Traditional – two-step with “double” signatures.

SPA is separate document.

SPA is inside the will.
Self-Proving Affidavit
The *Boren* Issue
4. Formalities – Holographic Wills

wholly in decedent’s handwriting
In about 50% of the states including Texas, wills that are in the testator’s own handwriting do NOT need to be witnessed.
Changes to Property

After Will Execution
Ademption
Causes
Basic Principles of Ademption

- A specific gift adeems, that is, fails.
- Beneficiary does not receive:
  - Value of gift.
  - Substitute gift.
  - Proceeds of sale of property still in estate.
Exoneration
If specific gift is subject to debt, lien, etc.,
does B:
- Get debt paid off (exonerated)?
- Take gift subject to debt (only receive equity)?
If will executed before 9/1/2005

- Exoneration presumed.
If will executed on or after 9/1/2005

- Exoneration not presumed.
  - EC § 251.301-251.303

- Generic “payment of debts” provision will not trigger exoneration.
Abatement
When testator dies without enough property to pay all debts and gifts, which gifts have priority?
Abatement Order -- EC § 355.109

- 1. Intestate Property, if any.

- 2. Residuary gift (personal, then real).

- 3. General gifts (personal, then real).

- 4. Specific gifts (personal, then real).
Changes to People

After Will Execution
Marriage
Impact on Existing Will

- No effect in Texas
  - But, community property now may be created.
Divorce
The following provisions are void:

- Ex-spouse as beneficiary.

- Ex-spouse’s relatives as beneficiary (unless they are also the deceased spouse’s relatives).

- Ex-spouse as fiduciary (executor, guardian of children, trustee).
Exceptions:

- Remarriage of spouses.
- Will of deceased spouse expressly provides otherwise.
EC §§ 123.001 & 123.002

- Passage of voided gift:
  - As if ex-spouse predeceased the testator.
Statute operates *only* upon a final divorce – not after filing or while pending.
Pretermitted Children
Defined

- Child born or adopted after Testator executes the will.
- Governed by:
  - EC §§ 255.051-255.056
Provide for “left-out” children by giving them a forced share

Based on theory that the testator would have provided for them if he/she had known they would exist.
T provided for PC in will

For example,

- “I leave my ranch to my children.”
- “I leave all my property to my spouse. If my spouse predeceases me, I leave all my property to my children.”
When Pretermitted Child Not Entitled To Share

- T provided for PC in will, or
- T provided for PC by non-probate asset
  - For example,
    - As a beneficiary of a life insurance policy.
    - As a pay on death beneficiary of a bank account.
When Pretermitted Child Not Entitled To Share

- T provided for PC in will, or
- T provided for PC by non-probate asset, or
- T mentioned PC in will.
  - Example
    - “I intentionally make no provision for any child born or adopted after I execute this will.”
1. Ascertain amount of estate not passing to PC’s other parent.

2. Give PC share of this amount as if Testator died intestate with no SS.
If Will Provides for at Least 1 of T’s Then Living Children

1. Ascertain amount of estate given to T’s children.
2. Ascertain number of children beneficiaries.
3. Ascertain number of PCs.
4. Add Bs plus PCs (Step 2 + Step 3).
5. Divide Step 1/Step 4 to determine amount each PC receives.
6. Gifts to other children reduced proportionately.
Lapse
Lapse defined

- Gift fails (lapses) because beneficiary dies before testator.
Distribution of Lapsed Gifts -- Overview

1. Under express terms of will.
2. Saved by anti-lapse statute.
3. Via residuary clause.
4. Via intestacy.
1. Beneficiary is descendant of
   - Testator, or
     - Child
     - Grandchild, etc.
   - Testator’s parent.
     - Brother/sister
     - Niece/nephew, etc.
2. Beneficiary physically or legally dies before testator.
   - Biological death first.
   - Biological death within 120 hours.
   - Disclaims.
3. Beneficiary left at least one surviving descendant.
4. Beneficiary’s descendant outlives testator by 120 hours.
5. Gift then passes to beneficiary’s descendants per capita with representation.
Will Revocation
Revocation by Physical Act
Requirements to Revoke by Physical Act

1. Mental Capacity
2. Revocation Intent
Requirements to Revoke by Physical Act


- “destroying or canceling”
  - By testator, or
  - By proxy in testator’s presence.
4. Concurrence of first three requirements.
Partial revocation by physical act

- **Examples:**
  - I leave $10,000 to Walter Bishop
  - I leave $10,000 to each of Walter Bishop and Peter Bishop.

- Texas = **No** effect on gift
Revocation by Subsequent Writing
Types of revocation writings

1. Will
Types of revocation writings

- 2. Codicil
3. Declaration in writing with will formalities.

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I revoke my Will.

Tess Tater
Burden of Proof
Applicant must prove testator did not revoke the will.

How prove a negative?
Presumption of Non-Revocation

- Source of will “normal”
  - Person to whom testator delivered it, or
  - Among testator’s valuable papers

  and

- No suspicious circumstances
Presumption of Revocation

- Testator possessed will when last seen and it cannot be found after death.
Proof of Lost Will -- EC § 256.154

1. Cause of non-production.

2. Court satisfied original cannot be produced by reasonable diligence.

3. Prove contents of will by testimony of someone who:
   - read the will,
   - heard the will read aloud, or
   - can identify a copy.
Questions?