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Wills, Trusts, and Estates for
Legal Assistants

Sixth Edition



Wolters Kluwer

Part Two

WILLS

Chapter 5

REQUIREMENTS FOR A VALID WILL



Chapter Objectives

- Analyze the elements of testamentary capacity
- Understand the formalities required for the proper execution of a will
- Explain the purposes of formal execution of a will
- Prepare an attestation clause and a self-proving affidavit
- Describe the requirements for a valid holographic will



Four Main Requirements for a Valid Will

- Legal capacity
- Testamentary capacity (Sound Mind)
- Testamentary intent
- Formalities



Ways in Which a Person May Acquire Legal Capacity

- Age
- Marital status
- Military service



Elements of Testamentary Capacity

- Testator comprehends action being taken and effect
- Testator knows nature and extent of his or her property
- Testator recognizes natural objects of his or her bounty
- Testator has elements in mind long enough to make reasoned judgment



Natural Objects of Bounty

- Spouse
- Children
- Parents
- Grandchildren
- Siblings



Testamentary Intent or Animus Testandi

Intent that an instrument serve as a testator's will



Purposes of Formal Execution

- Cautionary function
- Evidentiary function
- Protective function
- Channeling function

Recommended Witnesses

- Witnesses familiar with testator
- Supernumerary witnesses
- Youthful and healthy witnesses
- Traceable witnesses
- Witnesses who would favorably impress the court and jury

Attested Wills

- **Attested wills**, that is, wills that are witnessed, are the most common type of will.
- An attested will must be (1) in writing, (2) signed by the testator, and (3) witnessed.
- Despite relative uniformity among the states regarding these formalities, the specifics are often significantly different.



Attestation Clause

- A clause reciting that the testator duly executed the will.

Self-Proving Affidavit

- A **self-proving affidavit** is a statement by the testator and the witnesses affirming under oath that all the requirements of a valid will have been satisfied.
- Practically all states permit this affidavit to substitute for the in-court testimony of the witnesses when the testator's will is probated.
- In addition, the affidavit raises a presumption that the matters stated therein are true.
- Thus, the existence of a self-proving affidavit makes probating the will easier, faster, and more economical.

Execution Ceremony

- Select appropriate location
- Avoid interruptions
- Gather participants
- Seat participants strategically
- Make general introductions
- Explain ceremony
- Establish testamentary capacity
- Establish Testamentary Intent
- Conduct will execution
- Conduct witness attestation
- Complete a self-proving affidavit
- Conclude ceremony



After the Ceremony

- Confirm testator's intent
- Make copies of will
- Discuss safekeeping of original will
- Provide testator with post-will instructions

Approaches to Nonholographic Material

- Intent approach
- Surplusage approach
- Material provision approach



Holographic Will

- A will handwritten by the testator.



Uses of Holographic Wills

- Emergencies
- Privacy
- Interim will
- Entertainment



Nuncupative Will

- An oral will

Restrictions on the Validity of a Nuncupative Will

- Several states impose two or more of these types of limitations:
 - Types of property covered
 - Amount of property
 - Condition of testator
 - Location of speaking will
 - *Rogatio testium*
 - Number of witnesses
 - Proof
 - Notice



Notarized Will

- A few states dispense with the requirement of witnessing the will if the testator acknowledges the will in front of a notary public authorized to take acknowledgments. This procedure may be problematic, if the will needs to be probated in a state that does not permit notarization.