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ANATOMY OF A WILL

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Professional

- *Board Certified*, Estate Planning and Probate Law, Texas Board of Legal Specialization (since 1991)
- *Fellow*, American College of Trust and Estate Council (elected 1995)
- *Adjunct Professor of Law* (former), University of Houston Law Center, Houston, Texas, 1995 - 2001 (course: *Estate Planning*)
- Texas Bar Section on Real Estate, Probate and Trust Law
  - *Council Member*, 1998 - 2002; *Grantor Trust Committee Chair*, 1999 - 2002; *Community Property Committee Chair*, 1999 - 2002; *Subcommittee on Revocable Trusts chair*, 1993 - 94
  - Subcommittee on Transmutation, *member*, 1995 - 99, and *principal author* of statute and constitutional amendment enabling "conversions to community"

Education

University of Texas, Austin, Texas; J.D., *with honors*, May 1983; B.A., *with honors*, May 1980

Selected Speeches, Publications, etc.

- *Drafting Down (KISS Revisited) - The Utility and Fallacy of Simplified Estate Planning,* 20th Annual State Bar of Texas Advanced Drafting: Estate Planning and Probate Course, October 29-30, 2009 (Dallas) (outline and speech)
- *10 Drafting Mistakes You Don't Want to Make in Wills and Trusts (And How to Avoid Them)*, Houston Bar Association 2008 Wills and Probate Institute, February 7-8, 2008 (outline and speech)
- *Estate Planning with Life Insurance*, 28th Annual State Bar of Texas Advanced Estate Planning and Probate Course, June 9-10, 2004 (outline and speech)
- *Essential Estate Planning For (Potentially) Incapacitated Clients*, University of Texas School of Law, Intermediate Estate Planning, Guardianship and Elder Law Conference, August 15-16, 2002 (outline and speech)
- *The Family Limited Partnership - Marital Property & Ethical Considerations*, University of Texas School of Law, Current Issues Affecting Partnerships, Limited Partnerships and Limited Liability Companies, July 8 & 9, 1999, and July 19, 2002 (outline and speech)
- *Overview of Trust Administration Under The Texas Trust Code*, Texas School of Trust Banking, every June since 1995 (speech, outline by Steve Akers)
- State Bar of Texas Wills, Estates and Probate: A Satellite Broadcast, January 19, 2001: (i) Planning Chair, (ii) Institute Director and (iii) moderator of all panel discussions
- 10th Annual State Bar of Texas Advanced Drafting: Estate Planning and Probate Course, October 28-29, 1999: (i) Course Director; (ii) *Statutory Forms Update: An Overview of State Statutory Forms Revised by the '99 Texas Legislature* (outline and speech); and (iii) *Wrap-Up Session: A Summary and Additional Commentary* (joint presentation with Stephen Saunders)
- *Generation-Skipping Transfer Tax: Trust Severances and Exemption Allocations,* 21st Annual State Bar of Texas Advanced Estate Planning and Probate Course, June 4-6, 1997 (speech, outline prepared jointly with Mickey Davis & Jerry Scroggins)
- *Reality Check - Practical Estate Planning Applications*, Texas Society of Certified Public Accountants, 1996 Annual Advanced Estate Planning Conference, September 5-6, 1996 (outline and speech)
- *Anatomy of a Will*, 20th Annual State Bar of Texas Advanced Estate Planning and Probate Course, June 5-7, 1996 (speech, outline prepared jointly with Steve Akers)
- *Putting Revocable Trusts In Their Place*, 129 TRUSTS & ESTATES 8 (September 1990, cover story) (article)

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Anatomy of a Will - Table of Contents

ANATOMY OF A WILL

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SCOPE OF PRESENTATION

The outline is divided into four major parts.

Part 1 Nutshell of Substantive Law Regarding Validity of a Will. Part 1 presents a "nutshell" discussion of substantive wills law doctrines regarding the validity and legal effectiveness of a last will and testament.

Part 2 Specific Will Provisions. The typical estate planning client's first comments regarding the estate planning process often are: "I only need a simple will." Therefore, it is important to understand the substantive law reasons that particular clauses are needed in wills. Part 2 reviews various specific provision contained in wills, and summarizes will law, probate law and trust law doctrines affecting the specific provisions.

Part 3 Coordinating Nonprobate Assets. Part 3 briefly describes beneficiary designations for coordinating life insurance proceeds and death benefits from employee benefit plans with the provisions in the will.

Part 4 Appendix. Part 4 contains a will form checklist and samples of basic wills.

PART 1
NUTSHELL OF SUBSTANTIVE LAW REGARDING VALIDITY OF A WILL.

I.
FUNDAMENTAL REQUIREMENTS OF A WILL

A. What Is a "Will"?

1. GENERALLY.

Broadly stated, a "will" is the legal declaration of a person's intentions which he or she wills to be performed after his or her death. "A will is generally defined as an instrument by which a person makes a disposition of his property to take effect at his death, and which by its own nature is ambulatory and revocable during his lifetime." *In re Estate of Brown*, 507 S.W.2d 801, 803 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). While clearly not an advisable practice, a single document may be drafted to serve as both a will and another legal instrument. *See Calhoun v. Killian*, 888 S.W.2d 51 (Tex. App.—Tyler 1994, writ den'd) (single document qualified as both a will and a lease); *compare Dickerson v. Brooks*, 727 S.W.2d 652, 654 (Tex. App.—Houston [1st. Dist.] 1987, writ ref'd, n.r.e.) (single instrument qualified as a promissory note and a nontestamentary transfer under former Probate Code § 450(a) (predecessor to Texas Estates Code § 111.052(a)); therefore, transfer at death was effective notwithstanding lack of donor's signature).

The Texas Estates Code clarifies the breadth of the term "Will" as follows:

> "'Will' includes a Codicil; and a testamentary instrument that merely: (1) appoints an executor or guardian; (2) directs how property may not be disposed of; or (3) revokes another will." ESTATES CODE Texas Estates Code § 22.034 (formerly Probate Code § 3(ff)).

2. ORIGIN OF THE TERM "LAST WILL AND TESTAMENT".

The origin of the term "Last Will and Testament" itself is interesting. A common belief is that the term "Will," being an old English word, was used by the king's common law courts, who administered real property, and that the term "Testament," being a word of Latin origin, was used by Latin-trained ecclesiastical courts, which administered personal property. However, there is evidence that these common stated assumptions are incorrect, and that the words have been used interchangeably as far back as the English records go, even before the development of the Court of Chancery. *See* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 331 (1963). Professor Mellinkoff's theory is that the phrase "Last Will and Testament" is traceable to the English law's custom of doubling words of English origin with synonyms of French or Latin origin (free and clear, had and received, etc.).

3. SUMMARY OF BASIC REQUIREMENTS.

The basic requirements of a will are:

- It must identify the testator;
- It must be written with "testamentary intent";

- The testator must have "testamentary capacity" to execute a will (i.e., over eighteen years of age and of sound mind); and
- The will must be executed with the requisite testamentary formalities.

B. Testamentary Intent

1. GENERALLY.

The testamentary intent requirement is not statutory, but is required under a well-developed body of case law. *See generally* EDWARD W. BAILEY, TEXAS PRACTICE - TEXAS LAW OF WILLS §§ 221-226 (1968). "The animus testandi does not depend upon the maker's realization that he is making a will, or upon his designation of the instrument as a will, but upon his intention to create a revocable disposition of his property to take effect after his death. It is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate." *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955).

2. INSTRUMENT CLEARLY LABELED AS A WILL.

Typically, there will be no question regarding the testamentary intent of a testator who signs an instrument that is clearly labeled as a will and is in the general form of a will. However, an instrument in the form of a will is not executed with testamentary intent where it is executed under compulsion, merely as part of a ceremony, or for purposes of deception. *See Shiels v. Shiels*, 109 S.W.2d 1112, 1115 (Tex. Civ. App.—Texarkana 1937, no writ) (instrument labeled as a will denied probate where the instrument was signed solely for the purpose of complying with requirements to enter into a lodge, but testator told witnesses that he did not want to make a will and signed the instrument only after being told he would be able to revoke it after the completion of the initiation).

3. MODELS OR INSTRUCTION LETTERS.

Numerous cases have indicated that letters directing the preparation of a will or codicil may not be probated as the person's will. *See Price v. Huntsman*, 430 S.W.2d 831, 833 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) ("writings were not themselves intended to be her will or codicil, but were instructions or directions to her attorney to prepare a new will or codicil"). These cases are merely a corollary to the doctrine that the writer must manifest in the writing an intent to make a testamentary disposition of property "by that particular instrument."

4. EXTRANEOUS EVIDENCE OF TESTAMENTARY INTENT.

Extraneous evidence is admissible to show testamentary intent only if the instrument itself that is offered for probate contains language evidencing testamentary intent, but is ambiguous on this point. *Straw v. Owens*, 746 S.W.2d 345 (Tex. App.—Fort Worth 1988, no writ) (no amount of extrinsic evidence can supply absent testamentary intent to make instrument will); *Harper v. Meyer*, 274 S.W.2d 904, 906 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.) ("But if the instrument does not possess in some degree the essential characteristics of a will as above defined, sufficient, at least, to give rise to the doubt, extraneous evidence cannot supply that which is otherwise totally lacking."); *Maxey v. Queen*, 206 S.W.2d 114, 117 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) (extraneous evidence inadmissable because proposed instrument did not contain language of a testamentary nature).

C. Testamentary Capacity - Who Can Make a Will

1. STATUTORY PROVISION.

Section 251.001 of the Texas Estates Code (formerly Probate Code § 57) sets forth a two part test for testamentary capacity. The second component is a status and age requirement: In order to have testamentary capacity, the individual must (1) be 18 years of age or older, or (2) be or have been married, or (3) be a member of (a) the armed forces of the United States, (b) an auxiliary of the armed forces of the United States, or (c) the United States Maritime Service. Texas Estates Code § 251.001. (Under the predecessor statute, former Probate Code § 57, the marital status requirement was that the person be or have been "*lawfully* married."). Whether a particular individual satisfies this objective test is rarely an object of much controversy.

The first requirement of Section 251.001 is that the testator be "of sound mind." This subjective component of the testamentary capacity test is the inquiry relevant to this article and is a frequent object of controversy. The reporting cases often simply reference the question of the testator's sound mind as one of "testamentary capacity," without mentioning the status and age component.

2. JUDICIAL DEVELOPMENT OF THE "SOUND MIND" REQUIREMENT

a. Five Part Test-Current Rule.

In order for an individual to be of sound mind, the evidence must support a *jury finding* that the

Also available as part of the eCourse
Anatomy of a Will

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