ANATOMY OF A WILL

Bernard E. ("Barney") Jones

Author Contact Information:
Bernard E. ("Barney") Jones
Attorney at Law
3555 Timmons Lane, Suite 1020
Houston, Texas 77027

713-621-3330
Fax 713-621-6009
bjpub@bejlaw.com
Bernard E. ("Barney") Jones
Attorney at Law

3555 Timmons Lane, Suite 1020 • Houston, Texas 77027 • 713.621.3330 • fax 832.201.9219 • bjpub@bejlaw.com

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)

Revised June, 2010
# Anatomy of a Will - Table of Contents

## PART I NUTSHELL OF SUBSTANTIVE LAW REGARDING VALIDITY OF A WILL

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.  FUNDAMENTAL REQUIREMENTS OF A WILL</td>
<td>1</td>
</tr>
<tr>
<td>A.  What Is a “Will”?</td>
<td>1</td>
</tr>
<tr>
<td>1.  Generally</td>
<td>1</td>
</tr>
<tr>
<td>2.  Origin of the Term “Last Will and Testament”</td>
<td>1</td>
</tr>
<tr>
<td>3.  Summary of Basic Requirements</td>
<td>1</td>
</tr>
<tr>
<td>B.  Testamentary Intent</td>
<td>2</td>
</tr>
<tr>
<td>1.  Generally</td>
<td>2</td>
</tr>
<tr>
<td>2.  Instrument Clearly Labeled as a Will</td>
<td>2</td>
</tr>
<tr>
<td>3.  Models or Instruction Letters</td>
<td>2</td>
</tr>
<tr>
<td>4.  Extraneous Evidence of Testamentary Intent</td>
<td>2</td>
</tr>
<tr>
<td>C.  Testamentary Capacity - Who Can Make a Will</td>
<td>2</td>
</tr>
<tr>
<td>1.  Statutory Provision</td>
<td>2</td>
</tr>
<tr>
<td>2.  Judicial Development of the “Sound Mind” Requirement</td>
<td>2</td>
</tr>
<tr>
<td>D.  Execution Requirements</td>
<td>6</td>
</tr>
<tr>
<td>1.  Summary</td>
<td>6</td>
</tr>
<tr>
<td>2.  Signed by Testator</td>
<td>6</td>
</tr>
<tr>
<td>3.  Attested and Subscribed by Two Credible Witnesses</td>
<td>7</td>
</tr>
<tr>
<td>4.  Witnesses Sign in Presence of Testator</td>
<td>10</td>
</tr>
<tr>
<td>5.  Requirements of Other States</td>
<td>11</td>
</tr>
<tr>
<td>6.  Interlineations</td>
<td>11</td>
</tr>
<tr>
<td>7.  Holographic Will</td>
<td>11</td>
</tr>
<tr>
<td>8.  Execution Ceremony</td>
<td>12</td>
</tr>
<tr>
<td>II. UPHOLDING THE VALIDITY OF A WILL IN A WILL CONTEST</td>
<td>12</td>
</tr>
<tr>
<td>A.  Lack of Testamentary Capacity and Insane Delusion; Burden of Proof</td>
<td>12</td>
</tr>
<tr>
<td>B.  Undue Influence</td>
<td>13</td>
</tr>
<tr>
<td>1.  Legal Test</td>
<td>13</td>
</tr>
<tr>
<td>2.  Burden of Proof</td>
<td>13</td>
</tr>
<tr>
<td>3.  Relevant Factors</td>
<td>14</td>
</tr>
<tr>
<td>C.  Fraud</td>
<td>14</td>
</tr>
<tr>
<td>D.  Mistake</td>
<td>14</td>
</tr>
<tr>
<td>1.  Mistake in the Factum</td>
<td>14</td>
</tr>
<tr>
<td>2.  Mistake in the Inducement</td>
<td>15</td>
</tr>
<tr>
<td>E.  Testator Did Not Know Contents of Will</td>
<td>15</td>
</tr>
<tr>
<td>1.  General Rule</td>
<td>15</td>
</tr>
<tr>
<td>2.  Presumption of Knowledge of Contents</td>
<td>15</td>
</tr>
<tr>
<td>3.  Suspicious Circumstances Rebut Presumption</td>
<td>16</td>
</tr>
<tr>
<td>4.  Burden of Proof</td>
<td>16</td>
</tr>
<tr>
<td>F.  Will Subsequently Revoked</td>
<td>16</td>
</tr>
<tr>
<td>G.  Improper Execution</td>
<td>16</td>
</tr>
<tr>
<td>H.  Prior Acceptance of Benefits by Contestant</td>
<td>16</td>
</tr>
<tr>
<td>I.  Recovery of Attorney’s Fees</td>
<td>16</td>
</tr>
<tr>
<td>1.  By Executor - Mandatory</td>
<td>16</td>
</tr>
<tr>
<td>2.  By Beneficiaries - Discretionary</td>
<td>16</td>
</tr>
<tr>
<td>3.  Good Faith Requirement</td>
<td>17</td>
</tr>
<tr>
<td>J.  Attorney Liability</td>
<td>17</td>
</tr>
<tr>
<td>1.  Barcelo v. Elliott – Claims by Intended Beneficiaries</td>
<td>17</td>
</tr>
<tr>
<td>2.  Arlitt v. Patterson</td>
<td>17</td>
</tr>
<tr>
<td>3.  Belt v. Oppenheimer – Claims by Personal Representative</td>
<td>18</td>
</tr>
<tr>
<td>4.  Prior Texas Cases</td>
<td>18</td>
</tr>
<tr>
<td>5.  Other States</td>
<td>19</td>
</tr>
<tr>
<td>K.  Proceedings Involving Charitable Trusts</td>
<td>19</td>
</tr>
</tbody>
</table>
III. REVOCATION .................................................................................................................................................... 20
A. By Subsequent Writing........................................................................................................................................ 20
1. Statutory “Like Formalities” Requirement ..................................................................................................... 20
2. Language in Writing Sufficient to Constitute Revocation ............................................................................... 20
3. Implied Partial Revocation .............................................................................................................................. 21
B. By Physical Act .................................................................................................................................................. 21
1. Statutory Requirement .................................................................................................................................... 21
2. Sufficiency of Physical Act to Accomplish Revocation .................................................................................. 21
3. Mistaken Belief of Destruction Insufficient ................................................................................................... 21
4. Partial Revocations by Physical Act ................................................................................................................ 21
C. By Operation of Law ........................................................................................................................................ 22
1. Subsequent Divorce ......................................................................................................................................... 22
2. Subsequent Children ....................................................................................................................................... 23
D. Presumptions Regarding Revocation ................................................................................................................ 23
1. Proponent of Will Has Burden of Proving Will Not Revoked ...................................................................... 23
2. Presumption of Continuity ............................................................................................................................... 23
3. Evidence of Revocation Rebuts Presumption of Continuity .......................................................................... 24
4. Lost Wills ....................................................................................................................................................... 24
E. Revoked Will May Not Be Revived Except by Re-Execution or Republication ............................................. 24
F. Dependent Relative Revocation ....................................................................................................................... 24
1. Mistake of Law ............................................................................................................................................... 24
2. Mistake of Fact ............................................................................................................................................... 25
3. Application of Dependent Relative Revocation Doctrine in Texas ............................................................... 25
PART 2. SPECIFIC WILL PROVISIONS .................................................................................................................. 25
I. EXORDIUM CLAUSE ....................................................................................................................................... 25
A. Example ......................................................................................................................................................... 25
B. Purposes of Exordium Clause .......................................................................................................................... 25
1. Identify Testator ............................................................................................................................................ 25
2. Establish Domicile ......................................................................................................................................... 25
3. Declaration and Publication of Will ............................................................................................................... 25
4. Revoke Prior Wills ......................................................................................................................................... 25
II. INTRODUCTORY PARAGRAPH IDENTIFYING FAMILY AND PROPERTY BEING DISPOSED ...................... 25
A. Identify Family .............................................................................................................................................. 25
B. Identify Property Being Disposed ................................................................................................................... 26
III. APPOINTMENT OF FIDUCIARIES .................................................................................................................. 26
A. Executor ......................................................................................................................................................... 26
1. Appointment of Independent Executor ........................................................................................................... 26
2. Persons Eligible for Appointment as Executor ............................................................................................... 28
3. Selection; Restrictions on Self-dealing ........................................................................................................... 29
4. Co-executors ............................................................................................................................................... 30
5. Bond ............................................................................................................................................................. 30
B. Trustee ............................................................................................................................................................ 31
1. Selection of Trustee ....................................................................................................................................... 31
2. Co-trustees .................................................................................................................................................... 33
3. Successor Trustees ....................................................................................................................................... 34
4. Requirement of Bond .................................................................................................................................... 34
5. Removal Power ............................................................................................................................................ 34
C. Guardian ......................................................................................................................................................... 34
1. Surviving Parent’s Authority to Name Guardian .......................................................................................... 34
2. Selection of Guardian by Minor ...................................................................................................................... 35
3. Guardian for Minor Child if None Appointed by Last Surviving Parent (or Child). .................................... 35
4. Co-Guardians ............................................................................................................................................... 35
5. Disqualified Appointees ................................................................................................................................. 36
6. Historical Note: “Party to a Lawsuit” Problem ............................................................................................ 36
7. Selection of Guardian ................................................................................................................................... 36
IV. SUBSTANTIVE LAW DOCTRINES AND GENERAL CONSIDERATIONS REGARDING DISPOSITIVE PROVISIONS ............................................................................................................................................................. 37

A. Freedom of Testamentary Disposition ........................................................................................................................................................................ 37
   1. General Rule .......................................................................................................................................................................................... 37
   2. Power to Disinherit; Power to Direct Intestate Distribution .................................................................................................................. 37
   3. Protection of Surviving Spouse ......................................................................................................................................................... 37
   4. Protection of Children .................................................................................................................................................................... 40
   5. Public Policy Restrictions ......................................................................................................................................................... 40
   6. Property Law Restrictions ...................................................................................................................................................... 40
   7. Restrictions on Bequests to Drafting Attorney ............................................................................................................................ 41
   8. No Restrictions on Gifts to Charity ........................................................................................................................................ 41

B. Substantive Law Doctrines Regarding Changes of Beneficiaries After Will Is Executed ........................................................................................................................................... 41
   1. Death of Beneficiary-lapse .................................................................................................................................................. 41
   2. Pretermitted Child ......................................................................................................................................................... 43
   3. Divorce .................................................................................................................................................................................. 46
   4. Death of a Child ..................................................................................................................................................... 46

C. Substantive Law Regarding Extraneous References, Integration, Incorporation by Reference, Facts of Independent Significance .................................................................................................................................................... 47
   1. Integration ........................................................................................................................................................................... 47
   2. Incorporation by Reference ................................................................................................................................................ 47
   3. Facts of Independent Significance ........................................................................................................................................ 48
   4. Identification of Property-contents Gifts ........................................................................................................................................ 48
   5. Reference to Will of Another Person ........................................................................................................................................ 49

D. General Considerations Regarding Placing Restrictions on Bequests ........................................................................................................................................................................... 49
   1. Life Estate ......................................................................................................................................................................... 49
   2. Conditional or Determinable Fee Interests ........................................................................................................................................ 50
   3. Conditional Bequest ......................................................................................................................................................... 50
   4. Testamentary Annuities ..................................................................................................................................................... 51
   5. Testamentary Option .................................................................................................................................................... 51
   6. Restraints on Alienation ........................................................................................................................................... 51
   7. Providing for “TUTMA” Custodial Accounts for Beneficiaries under Age 21 .......................................................................................................................................................... 52
   8. Direction to Sell Property ................................................................................................................................................ 53

E. Income During Estate Administration ........................................................................................................................................................................... 53
   1. General Absence of Texas Cases ........................................................................................................................................ 53
   2. Statutory Provisions ....................................................................................................................................................... 53
   3. Specific Bequests .......................................................................................................................................................... 54
   4. General Legacy .......................................................................................................................................................... 55
   5. Demonstrative Legacies ................................................................................................................................................ 56
   6. Residuary Bequests ....................................................................................................................................................... 56
   7. Bequest in Trust .......................................................................................................................................................... 56
   8. Will Provision Controls ................................................................................................................................................... 57

F. Planning for Disclaimers .......................................................................................................................................................................................... 57
   1. Disclaimer by Spouse of Interest in Property under One Transfer but Not under Other Transfers .................................................................................................................................................... 57
   2. Disclaimer of Survivorship Property ............................................................................................................................................ 57
   3. Future Interest Accelerated ................................................................................................................................................ 57
   4. Delivery of Notice of Disclaimer ............................................................................................................................................... 57
   5. Creditor Effects of Disclaimer ........................................................................................................................................... 57

V. DISPOSITIVE PROVISIONS FOR SPECIFIC BEQUESTS ............................................................................................................................................................................... 58

A. Substantive Law Doctrines Affecting Specific Bequests Generally ........................................................................................................................................................................... 58
   1. Ademption ....................................................................................................................................................................... 58
   2. Abatement ...................................................................................................................................................................... 60
   3. Exoneration of Encumbrances .................................................................................................................................................. 60
   4. Income Tax Effects of Funding Specific Bequests .................................................................................................................................................. 61

B. Specific Bequest Provisions .......................................................................................................................................................................................... 61
   1. Tangible Personal Property .................................................................................................................................................. 61
   2. Real Estate ...................................................................................................................................................................... 62
3. Stock ................................................................................................................................................... 62
4. Pecuniary Legacies .............................................................................................................................. 63
5. Formula Marital Deduction or Exemption Equivalent Specific Bequests........................................ 64
6. Charitable Bequests ............................................................................................................................ 65
7. Cancellation of Debts .......................................................................................................................... 65
C. Exercise of Power of Appointment ..................................................................................................... 66
1. Presumption That Will Does Not Exercise Powers of Appointment .................................................. 66
2. Wills Executed on or after September 1, 2003 .................................................................................. 66
3. Conflict of Laws - Will Should Expressly Negate Exercise ................................................................. 66
VI. DISPOSITION OF RESIDUARY ESTATE ............................................................................................... 66
A. Generally .............................................................................................................................................. 66
B. Residuary Clause Important to Prevent Partial Intestacy .................................................................... 66
1. Presumption Against Intestacy ........................................................................................................... 66
2. Intestate Disposition of Community Property .................................................................................... 67
C. Property Covered by Residuary Estate Clause .................................................................................. 67
D. Provisions for Successor Beneficiaries ............................................................................................... 67
E. Pour-Over Disposition ........................................................................................................................ 67
VII. TRUST PLANNING ............................................................................................................................... 68
A. Contingent Trust for Beneficiaries Below Specified Age or Incapacitated ........................................... 68
B. Major Trust Provisions ....................................................................................................................... 68
1. Trustee and Successor Trustees .......................................................................................................... 68
2. Distributions During Trust Term ........................................................................................................ 68
3. Termination Provisions ....................................................................................................................... 69
4. Powers of Trustees .............................................................................................................................. 69
VIII. PAYMENT OF DEBTS AND ADMINISTRATION EXPENSES ............................................................. 69
A. Debts and Expenses That Are Charged to the Estate ........................................................................... 69
1. Debts .................................................................................................................................................. 69
2. Community Debts .............................................................................................................................. 69
3. Funeral Expenses ............................................................................................................................... 70
4. Charitable Pledge ................................................................................................................................. 70
B. Allocation of Debts and Expenses Among Estate Assets ..................................................................... 70
1. Absence of Will Provision .................................................................................................................... 70
2. Will Provisions .................................................................................................................................. 71
IX. APPORTIONMENT OF TAXES .............................................................................................................. 71
A. Absence of Tax Apportionment Provision in Will ................................................................................ 71
1. Prior to Adoption of Probate Code Section 322a ............................................................................... 71
2. Apportionment under Probate Code § 322a (Current Law) ................................................................ 71
B. Tax Apportionment Provision in Will Controls .................................................................................. 71
1. Law Prior to September 1, 1991 .......................................................................................................... 72
2. Law Effective after September 1, 1991 ............................................................................................... 72
3. Drafting Considerations .................................................................................................................... 72
C. Conflict of Laws Regarding Apportionment ....................................................................................... 72
X. GENERAL PROVISIONS REGARDING FIDUCIARIES AND ADMINISTRATION OF TRUSTS AND THE ESTATE ........................................................................................................................................... 73
A. Relying Upon Fiduciary Powers Granted Under Texas Trust Code .................................................. 73
1. Texas Trust Code Fiduciary Powers ..................................................................................................... 73
2. Advantages of Merely Incorporating Trust Code Powers .................................................................. 73
3. Disadvantages of Merely Incorporating Trust Code Powers ............................................................ 73
4. Applicability of Trust Code Provisions ............................................................................................... 73
5. Adoption of Uniform Prudent Investor Act and Uniform Principal and Income Act ....................... 74
B. Additional Fiduciary Provisions Not Included in Texas Trust Code ................................................ 74
1. Overview ........................................................................................................................................... 74
2. General Trust Provisions ................................................................................................................... 74
3. General Fiduciary Powers .................................................................................................................. 76
4. Special Provisions Regarding Executors ............................................................................................ 83
XI. MISCELLANEOUS PROVISIONS ........................................................................................................... 84
A. Will Not Contractual .......................................................................................................................................... 84
B. Definition of Issue and Children .................................................................................................................. 84
   1. Define “Issue” to Include All Descendants .............................................................................................. 84
   2. Limited to Legitimate Issue Unless Otherwise Provided ........................................................................ 85
   3. Include Afterborn Children ...................................................................................................................... 85
   4. Specifically Indicate Whether Adopted Issue and Children Included ..................................................... 85
C. Definition of Survival ................................................................................................................................... 85
D. Definition of Per Stirpes ................................................................................................................................ 86
E. Headings Not Used in Construing Will .......................................................................................................... 86
F. In Terrorem Clause ........................................................................................................................................ 86
   1. Texas Cases Generally Recognize Validity ............................................................................................. 86
   2. Forfeiture Clauses Generally Not Enforced Where Beneficiary Contests Will for Reasonable Cause ........................................................................................................................................ 86
   3. Actions Not Causing Forfeiture ................................................................................................................. 86
   4. Clause Should Be Baited ............................................................................................................................ 87
   5. Effect on Availability of Marital Deduction ............................................................................................ 87
G. Stating Reasons Why Particular Beneficiaries Receive Nothing; Testamentary Libel .................................. 87
H. Designation of Attorney for Estate ................................................................................................................ 87
I. Attestation Clause .......................................................................................................................................... 88
J. Self-Proving Affidavit ................................................................................................................................... 88

PART 3. COORDINATING NONPROBATE ASSETS .......................................................................................... 88
A. Significance ................................................................................................................................................... 88
B. Drafting Considerations ................................................................................................................................ 88
C. Buy-Sell Agreements ..................................................................................................................................... 89

PART 4. APPENDICES .......................................................................................................................................... 89
Appendix A Checklist for Will Review ................................................................................................................. 89
Appendix B Will Forms ....................................................................................................................................... 92
   1. SIMPLE “SWEETHEART” WILL ........................................................................................................... 92
   2. DISCLAIMER WILL ................................................................................................................................. 110
ANATOMY OF A WILL  
Bernard E. (“Barney”) Jones

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”;

Page 1
• 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.**
   
   Extrinsic 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, extrinsic 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 inadmissible 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
Title search: Anatomy of a Will

First appeared as part of the conference materials for the 18th Annual Estate Planning, Guardianship and Elder Law Conference session "Anatomy of a Will"