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ESTATES, GIFTS, AND TRUSTS

Testamentary Capacity, Undue Influence and Validity of Wills

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ESTATES, GIFTS, AND TRUSTS

Testamentary Capacity,
Undue Influence and Validity of Wills

PORTFOLIO DESCRIPTION

Tax Management Portfolio, Testamentary Capacity, Undue Influence and Validity of Wills, No. 824-3rd, addresses the requirements for the execution of a valid will, a critical element in the implementation of a successful estate plan. If a will is to be recognized as valid, it must comply with the formalities of execution under state law and the testator must have the necessary testamentary intent. The Detailed Analysis discusses the formalities of execution in depth, since the validity of a will depends upon adherence to the requirements of the jurisdiction in which the will is executed as well as that in which it is ultimately probated.

The discussion begins with the historical background to will formalities. Much of the discussion of current law is based on the provisions of the 1969 Uniform Probate Code and the 1990 Revised Uniform Probate Code, which form the basis of most state statutes. In addition, the Portfolio provides summaries of the execution requirements of all 50 states and the District of Columbia, as well as the choice of law rule in each jurisdiction. Finally, the authors provide detailed, practical suggestions for ensuring that a client’s will complies with the relevant execution requirements so that it withstands any subsequent challenge.

Even if a will is executed with the necessary formalities, it is still subject to challenge if the testator did not have the required testamentary capacity at the time of execution or was subject to undue influence. This Portfolio addresses both of these issues, again relying upon the Uniform Probate Code, the Revised Code, and state law. The law of testamentary capacity in Kentucky, Pennsylvania, Florida, and Colorado is explained in more detail as a way of demonstrating the varying standards in the states, and there is a similar examination of Florida, Wisconsin, and Kentucky law with respect to undue influence.

In its final section, the Detailed Analysis addresses issues that are significant in will contests, with suggestions for drafting and executing wills in a manner that will avoid such contests. The authors highlight a number of situations that are at an especially high risk of leading to will contests, and prescribe additional precautions that can be taken in those cases. They also discuss the ethical issues that may be faced by attorneys when preparing wills and when representing an estate in a will contest.

This Portfolio may be cited as Marty-Nelson, Gilmore, and Rodriguez-Dod, 824-3rd T.M., Testamentary Capacity, Undue Influence and Validity of Wills.

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I. Introduction

In order for a will to dispose of the testator's property at death, it must: (1) comply with the requisite formalities of execution; and (2) have been executed with the necessary testamentary intent. This is a conjunctive requirement. Thus, a document that was intended as a will may not transfer property at death if the necessary formalities (e.g., signature, witnesses) are missing. Conversely, a well-crafted and carefully executed document will not be valid as a will if the purported testator did not have the testamentary capacity or the intent to make a will. Without both formalities and testamentary intent, a will is not valid.

This Portfolio discusses both the formalities necessary for execution and the requisite testamentary intent and capacity necessary for a valid will. These two requirements can be thought of as the "mechanical" elements and the "mental" elements, respectively, of a valid will. Will challenges are predicated either on the failure of the mechanical grounds (i.e., the will failed to satisfy the necessary formalities) or on the mental grounds (e.g., the testator did not have the requisite testamentary capacity or intent) or both. The mental grounds challenge may be cast as a challenge based on lack of testamentary capacity, undue influence, fraud, lack of knowledge of the contents, or a combination thereof. As indicated in the ensuing sections, execution issues and challenges based on the mental elements are inextricably linked.

The mechanical elements of will formalities are taken up first. Failure to follow the required mechanical formalities for will execution can lead to costly litigation, delays in probating the estate, potential malpractice claims against the attorney/drafters, and circumvention of the client's wishes. The discussion herein, and the worksheets that appear at the end, describe will execution procedures designed to bolster the validity of a will and protect it from a challenge based on improper execution. Although the Portfolio also attempts to describe the variety of requirements for each state, the statutes cited herein are subject to revision and local rules may somewhat vary the analysis. Thus, it is important to supplement these references with further research for the particular jurisdiction.

After the discussion of the mechanical elements, the requisite mental elements of a will are taken up. The focal point of the discussion is a review of lack of capacity and undue influence, the two most prevalent challenges of the mental elements. Again, the various states have developed specific elements and provisions for the various mental elements contests. The Portfolio discusses how several states have analyzed lack of testamentary capacity and undue influence challenges.

The penultimate section of the Portfolio covers several important issues relating to will contests. This section is designed to help attorneys who draft and execute wills avoid will contests. Conversely, the analysis of the ways in which a will may be found lacking may be of interest to attorneys considering bringing a will contest.

Finally, the Portfolio includes worksheets to assist the practitioner. The Worksheets are intended to guide the attorney who supervises the execution of a will. In addition, the worksheets should also prove useful to attorneys who litigate will contests.

The scope of this Portfolio is limited to the formalities of will execution and will contests based on lack of testamentary capacity and undue influence. This Portfolio does not address will substitutes such as inter vivos trusts that could be appropriate in cases of expected will contests, issues regarding the drafting of wills, or other estate planning issues not directly related to will contests. Interested practitioners should consult the Tax Management Portfolios that are dedicated to those topics.3

3 For a discussion of revocable inter vivos trusts, see 860 T.M., Revocable Inter Vivos Trusts, and 859 T.M., Uniform Trust Code. For estate planning issues, see 800 T.M., Estate Planning. For conflicts and ethical issues, see 801 T.M., Conflicts, Confidentiality, and Other Ethical Considerations in Estate Planning.

For simplicity, the term "testator" is used to refer to either a testator or intestate in general discussions.
II. Formalities of Execution

Each state has specific requirements for a will to be valid. The formalities of execution vary from state to state. Before discussing the preferred execution ceremony, it is helpful to understand the historical background of and the purposes for will formalities.

A. Historical Background

The U.S. laws of descent and distribution are derived from the English system. Under the English system, during feudal times, devises of personality were permitted by the law courts, but devises of land were not. The functional equivalent of a will devising land was, however, permitted in the equity courts by a contrivance known as a "use." Very generally, a use required legal title to land to be transferred to some trusted individual (roughly akin to the modern concept of a trustee), who would hold the legal title to the land for the benefit of the intended beneficiary, who would have an equitable interest. If the trustee failed to carry out any instruction of the transferee concerning the property, the transferee or his successors in interest went to the equity courts to force the trustee to comply. The system of the use was effective as the functional equivalent of a will until the Statute of Uses was enacted in 1536. The Statute of Uses provided that as soon as an equitable interest was created in the beneficiary of the use, the equitable interest was immediately converted into a legal interest. Since legal title to land could not be devised, the Statute of Uses blocked the functional equivalent of the will through the use.

The elimination of testamentary freedom was so unpopular that only four years later, in 1540, England passed the first statutes explicitly allowing testamentary dispositions of land. The Statute of Wills, passed in 1540, required only minimum formalities. It appears that the only formality necessary under the 1540 Statute of Wills was that the document be in writing. Although the right to devise land was a much heralded development, the 1540 Statute of Wills was limited in that it only served to devise land that the testator owned at the time of will execution. The will was not effective to devise land acquired post-execution. Moreover, the 1540 Statute of Wills, however laudable, was thought not to contain significant protective features for devises, such as witnesses.

When the Statute of Frauds was passed in England in 1677, it was specifically drafted to include devises within its scope. Section 5 of the Statute of Frauds required many of the formalities for a valid devise that are familiar to practitioners today:

Statute of Frauds, 1677, 29 Car. 2:3. Section 5. [All devises and bequests of any lands . . . shall be in writing, and signed by the party so devising the same,

or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said deviseor by three or four credible witnesses, or else they shall be utterly void and of none effect.

Thus, the formalities required under the Statute of Frauds were:

• a writing;
• that was signed by the testator (or by another in his presence and at his direction); and
• that was (i) attested to and (ii) signed in the presence of the testator by three or four credible witnesses.

More than a century and a half passed before the protective measures of the Statute of Frauds were further refined through the passage in 1837 of the Wills Act (not to be confused with the 1540 Statute of Wills). The formalities required in the Wills Act were stricter than those in the Statute of Frauds:

Wills Act, 1837, 7 Wil. 4 & 1 Vict. C. 26 Section 9. [No will shall be valid unless it shall be in Writing and Executed in manner herein-after mentioned . . . it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator . . .

Thus, the formalities required under the Wills Act were:

• a writing;
• a signature at the end by the testator (or by another in his presence and at his direction);
• the testator’s signature was made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
• the witnesses (i) attested to and (ii) signed the will in the presence of the testator.

The Wills Act added two formalities to those required under the Statute of Frauds. First, the Wills Act required that the witnesses “be present at the same time.” Second, the Wills Act required that the testator’s signature “be signed at the foot or end thereof.” On the other hand, the Wills Act reduced the number of witnesses to two.

For many years, the various American state probate statutes were patterned generally after either the 1677 English Statute of Frauds or the 1837 Wills Act. In a few states, however, the legislatures added some formal execution requirements that were not contained in either of those laws, such as the requirement that the testator “publish” the will, usually by declaring verbally before the witnesses that the instrument is

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his or her will.19 In 1969, in an effort to establish some uniformity, the National Conference of Commissioners on Uniform State Laws promulgated the first Uniform Probate Code (the "Original UPC").20 The Original UPC was adopted by several states. There were some minor revisions to the Original UPC between the years 1969 and 1989. In 1990, a major overhaul of the Original UPC was completed, leading to what is referred to as the Revised UPC.21 Several states have patterned their statutes after the Revised UPC. Accordingly, current American probate statutes generally have four derivations: (1) the Statute of Frauds; (2) the Wills Act; (3) the Original UPC; or (4) the Revised UPC.

The derivation of a state’s statute often has consequence in the way courts interpret the statute. For example, in interpreting the Connecticut wills statute, the Connecticut Supreme Court noted that the Connecticut statute was patterned after the less restrictive English statute of Frauds and, thus, Connecticut did not require that attesting witnesses sign in the presence of each other.22

For states that have adopted the Original UPC or the Revised UPC, it is helpful to set forth the terms of the UPC in order to compare those provisions to those in the current state statute. The Original UPC required that the will be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s presence and by the testator’s direction; and (3) signed by at least two persons who witnessed either the testator’s act of signing or the testator’s acknowledgment of either the signature or the will.23

The Revised UPC was similar to the Original UPC, but relaxed the formalities somewhat further. The Revised UPC required that the will be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s presence and by the testator’s direction; and (3) signed by at least two individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in (2) or the testator’s acknowledgment of that signature on the will.24

The Revised UPC was amended in 2008 to again relax the formalities. The UPC as amended in 2008 requires that the will be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s presence and by the testator’s direction; and (3) either: (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in (2) or the testator’s acknowledgment of that signature on the will; or (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.25

B. Purposes of Will Formalities

The mechanical elements of will formalities are best understood in terms of the purposes they are designed to serve. Generally, modern statutory will formalities (the mechanical elements) are said to serve four functions: (1) cautionary; (2) evidentiary; (3) protective; and (4) channeling. Each of the functions is described below.

1. Cautionary Function

Statutory will formalities are said to serve the cautionary function of requiring the testator to think seriously about the actions he or she is about to undertake.26 By ritualizing the steps for will execution, the statutes attempt to caution the testator that he or she is doing something other than just casual talk.27 It is thought to be much easier to use casual talk such as “I will always take care of you,” than it is to convert that statement into a devise in a validly executed will. The New Jersey Supreme Court explained that “the ceremony serves as a ritual that impresses the testator with the seriousness of the occasion.”28

When analyzing the cautionary function as a justification for various statutory execution formalities for wills, it is helpful to see how the cautionary function is satisfied in the related area of transfers of property by inter vivos gifts. In the case of inter vivos gifts, the cautionary function is often mentioned as one of the justifications for the delivery element29 (a ritual formality) for determining the validity of an inter vivos gift. The delivery element is said to serve the cautionary function in gifts, because actual delivery of the item requires a far greater commitment of the donor than talking about delivery of a gift.

Whether the cautionary function is as necessary in the wills area as it is in the inter vivos gift context is a matter of debate. On the one hand, a will — unlike an inter vivos transfer — only serves to transfer property at the death of the testator. Thus, a testator (who still has capacity) is free to revoke a previously executed will, if he or she belatedly realizes (after will execution) the import of his or her actions and changes his or her mind. By contrast, an inter vivos gift is irrevocable. This distinction might suggest that the cautionary function is not as critical in the wills area as it is for gifts. On the other hand, caution is the rule for wills because death imbues the document with such finality. The ritual, it is argued, forces the testator to understand the consequences of making a will, i.e., it serves to caution the testator as to the import of his or her actions.

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19 Uniform Probate Code (UPC) § 3-108. The term “Original UPC” is derived from the Restatement (Third) of Property, Restoration (Third) of Property, § 311 (1999). The Original UPC was published in 1969 by the National Conference of Commissioners on Uniform State Laws. As to the Restatement (Third) of Property, the term Original UPC as used herein refers to the statute as promulgated in 1969 and as amended up to the 1999-1990 period.
20 The term “Revised UPC” is also derived from the Restatement (Third) of Property, Restoration (Third) of Property, § 3 (1999). The Revised UPC is often referred to as the 1990 UPC, because in 1990, the Uniform Law Commission undertook a major revision of Article 61 and Article II of the UPC. The Uniform Law Commission has made further revisions to the UPC in subsequent years.

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23 Uniform Probate Code (UPC) § 3-108. The term “Original UPC” is derived from the Restatement (Third) of Property, Restoration (Third) of Property, § 311 (1999). The Original UPC was published in 1969 by the National Conference of Commissioners on Uniform State Laws. As to the Restatement (Third) of Property, the term Original UPC as used herein refers to the statute as promulgated in 1969 and as amended up to the 1999-1990 period.
24 The term “Revised UPC” is also derived from the Restatement (Third) of Property, Restoration (Third) of Property, § 3 (1999). The Revised UPC is often referred to as the 1990 UPC, because in 1990, the Uniform Law Commission undertook a major revision of Article 61 and Article II of the UPC. The Uniform Law Commission has made further revisions to the UPC in subsequent years.
2. Evidentiary Function

The mechanical elements are also said to serve the evidentiary function by providing concrete evidence of the testator's intent with regard to his or her property. The Texas Supreme Court explained how the writing requirement, in particular, serves the evidentiary function:25

The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others [including the courts], after he is dead, to change or add to his will or to show that he intended something not set out in, or different from, that set out in his will.

Requiring the testator to sign the document further serves an evidentiary function by demonstrating that the document signifies the testator’s final version of the will. In addition, the requirement of witnesses serves to demonstrate the accuracy of the document. There is little disagreement that the formalities serve an evidentiary function in setting out a physical record of the testator’s intentions.

3. Protective Function

The will formalities, particularly the witnesses, are said to serve the function of protecting the testator from others. The presence of witnesses theoretically helps to scare away potentially bad characters from engaging in fraud or exerting undue influence over the testator. Similarly, the requirement that the witnesses sign the document in the testator’s presence is said to protect the testator from those who would commit a fraud upon the testator by switching the document with another.26 A Delaware court explained this purpose vividly writing that “full compliance with the statutory requirements for the execution of wills is necessary to minimize the opportunities for acts of fraud once the testator’s lips are sealed” by death or incapacity.27

4. Channeling Function

The channeling function (or what should be referred to as the administrative function) is basically that the more uniform the procedural pitfalls of wills are (at least within a state), the easier they are to administer. The uniformity of the procedures serve the probate courts and the probate system perhaps more than they serve the testator. They allow the courts to recognize the document as a will and to evaluate it accordingly. They also serve the attorney/drafter by standardizing the practice of preparing and executing wills so that each, hopefully, is executed in the same manner and with the same care.

C. Recurrent Issues Regarding the Mechanical Elements of Attested Will Execution

Each state statute provides the specific formalities necessary for a will to be valid in that state. This section of the Portfolio describes generally seven issues to focus on with regard to the mechanical formalities for wills. A survey of each state’s specific formalities requirements is provided in II, F, below. As an initial matter, it is important to note that all state statutes require that a will be in writing.28 Thus, an audio or digital recording alone will not suffice. No state requires its attested wills to be typewritten rather than handwritten, although commonly an attested will is typed. The issues explored herein are the: (1) testator’s signature; (2) witnesses; (3) presence; (4) publication; (5) choice of law; (6) compliance; and (7) self-proving affidavit.

1. Testator’s Signature

The signature requirement must be carefully analyzed for the particular state for two reasons: (a) the location of the testator’s signature on the document may be critical; and (b) an assisted or proxy signature for the testator may have particular requirements.

a. Location of Testator’s Signature

The first issue regarding the testator’s signature is exactly where on the document that signature must appear. Some states’ execution statutes (Arkansas, Connecticut, Florida, Kansas, Kentucky, Louisiana, New York, Ohio, Oklahoma, and Pennsylvania) require that the testator’s signature be located at the end of the will.29 The statutory term “subscribed” is generally interpreted as meaning signed at the foot or end of the will.30 In some of the states that require a subscribed will, the testator’s failure to sign precisely at the end of the will is fatal.31 In other states requiring that the signature appear “at the end,” the courts find that the signature is “at the end” when it is located after all of the “dispositive” provisions of the will even if some nondispositional provisions follow the signature. A Kentucky court held that the testatrix had sufficiently subscribed the will, even though following her signature, the will contained the date, the clause appointing the executor, and the witnesses’ signatures.32 The court reasoned that those three provisions below her signature were “nonsensical to the will’s validity” and they were “nondispositional provisions. Therefore, her signature was deemed to be at the end of the will.33

Even states that do not mandate that the signature appear “at the end” require that the testator’s name be a signature.34 Thus, if the name is not found freestanding at the end of the will, which would be optimal, the states require that the testator’s name on the document clearly have been intended to be a

26 In re Estate of Enslow, 130 P.2d 577, 581 (Or. 1943).
28 Same cases also allow revocatory wills (oral wills) in some very limited circumstances. In addition, Nevada now recognizes electronic wills. Nev. Rev. Stat. § 133.085.
31 Reed, 623 P.3d at 452.
33 Id.
34 Ala. Code § 43-8-131, listing formalities for proper will execution, requires that: every will shall be in writing signed by the testator or in the testator’s name by some other person in the testator’s presence and by his direction, and shall be signed by at least two persons each of whose witnesses either the signing in the testator’s acknowledgment of the signature or of the will. 824-3rd

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signature. Typically a signature is defined as the testator’s name placed on the document in a manner signifying finality. In an Illinois case, the testatrix had affixed at the beginning of the document the following: “Opal Wedberg’s Will Dated 1-2-88.” Her signature did not appear anywhere else on the document. However, at the end of the will two witnesses signed their names. The court explained that, regardless of the location of the signature, “the decisive question is not whether the deceased intended the instrument to be her will, but whether she intended the name appearing in the exordium clause to be her signature.” The court further explained that testator’s intent with respect to the signature can be proved by parol evidence. Although the will in Wedberg involved witnesses, the same principles regarding the requirement that the name be a “signature” apply to holographic wills. In a Texas case, the court held that “[w]hile the signature may be informal and its location is of secondary importance, it is still necessary that the maker intend that her name or mark constitute a signature, i.e., that it expresses approval of the instrument as her will.” Applying these principles, the court held the holographic will was invalid because the testator’s name only appeared in the document’s heading and because “the name was not written with the intention and purpose that it should be or was the signature of Decedent to the instrument.” Signature issues also arise when the testator signs only on the self-proving affidavit. The Texas Supreme Court in Orrell v. Cochran determined that a will failed for lack of the testator’s signature when his signature appeared only on the self-proving affidavit. The decedent in that case, George Cochran, attempted to execute a will in 1979 leaving his estate to his wife. The 1979 will was to have revoked a prior will that left his estate to his daughter. The 1979 will was drafted on a pre-printed form document that had a self-proving affidavit printed at the end. During execution of the 1979 will, the notary public signed where the testator was supposed to sign and the testator (George Cochran) signed only in the self-proving affidavit portion. The trial court admitted the 1979 will and the intermediate appellate court affirmed. The daughter appealed to the Texas Supreme Court, which reversed. The Texas Supreme Court held that the will was not valid. The court reasoned that the will and the self-proving affidavit were two separate, independent instruments and, accordingly, the signature’s testator did not appear on the will, so the testator never signed the will. While the Texas statute did not specify that the testator sign the will at the end, a signature somewhere on the will itself, and not the self-proving affidavit, was required. The Texas legislature has since amended the statutes to provide “A signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witnesses, or both, but in that case, the will may not be considered a self-proved will.” Other courts faced with this issue have taken the opposite approach to the Texas Supreme Court in Orrell and ruled that if the testator signs on the self-proving affidavit, the signature element is satisfied. In Hicks v. Wilson, the Georgia Supreme Court found, on facts similar to Orrell, that the will was signed. The testator went to great length to ensure her will was properly executed. The will consisted of three typed pages stapled together. The first two pages described her property and the third was a self-proving affidavit. The testator signed the third page first and then two witnesses and a notary public signed pages two and three. In addition, in the presence of both the witnesses and the notary, the testator declared the document to be her will. The Supreme Court of Georgia held that the will was validly executed notwithstanding the fact that the testator only signed the self-proving affidavit. The dispositive fact was that “all of the signature pages [were] physically connected as part of the will.” The Supreme Court of Georgia crystallized this holding a few years later in Westmoreland v. Taller, holding “a self-proving affidavit is part of the will and a testator’s signature solely on the affidavit constitutes a signature on the will.” b. Proxy Signature or Signature by Mark A second issue with regard to the testator’s signature on a will is under what circumstances (if at all) someone can assist the testator in signing or can sign for the testator, or the testator can sign by mark. If the testator has difficulty signing his or her name, it will be important to analyze the state statutes and case law carefully to determine if and when the testator can be assisted in placing his or her name on the will or when and how another person can sign for the testator (i.e., proxy signature), or when the testator can sign by mark. The states vary as to how much latitude is allowed in this area, so the particular rules and cases should be carefully scrutinized.
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II.C.2.b.

2. Witnesses

There are several issues under the witness requirement. First, it is important to note how many witnesses are required. Until recently, a significant minority of states required three witnesses. Second, states vary as to who qualifies as a witness. Third, there are different requirements as to what exactly a witness must witness. Fourth, states vary as to when and where one must document the witness must sign his or her name as a witness.

a. Number of Witnesses

Although in the past, a significant minority of states required three witnesses, recently Vermont became the last state to amend its laws to require two, rather than three, witnesses. Louisiana, however, provides that two witnesses and a notary must take part in the execution ceremony. Despite the statutorily required number of witnesses in a jurisdiction, if a will contest is expected, supernumerary witnesses may be beneficial. See the comment under step 2 in II, E, below, for reasons to increase the number of witnesses above the statutory minimum.

In satisfying the statutory two-witness requirement, some courts have accepted a notary as one of the witnesses. In In re Estate of Friedman, 2 the Supreme Court of Nevada was faced with whether, under the Nevada attested will statute, the signature of the notary public contained in the self-proving affidavit may constitute the signature of an attesting witness. The Supreme Court of Nevada concluded that the notary's signature was sufficient to satisfy the statutory requirement as long as the notary signed the self-proving affidavit in the testator's presence. Similarly, in In re Estate of Gerhardt, 3 the Superior Court of New Jersey held that a notary public who signed the decedent's will as a notary could qualify as a second witness in order to satisfy the two-witness requirement of New Jersey's wills statute.

b. Qualification of Witnesses

Many states impose statutory restrictions as to who may serve as a witness to a will. As an initial matter, all states require that the witnesses be competent to serve as witnesses. The term competent means generally qualified to testify in court concerning the material facts of execution. Competence is determined at the time of will execution and attestation. Thus, a witness who was competent at will execution but who subsequently becomes incompetent satisfies the statutory requirement. Conversely, a witness who was incompetent at will execution is not a valid witness even if he or she subsequently becomes competent. Some states expand on the competency requirement and provide a minimum age requirement for witnesses. For example, the Texas will execution statute provides that the will must be "attested by two or more creditable witnesses above the age of fourteen years . . . ." 4

The other critical issue with regard to the qualification of witnesses is whether the state permits or disallows interested witnesses. The majority of states continue to restrict the use of interested witnesses. Whether a witness is deemed interested turns on the particular state statute involved and on the construction of that statute. Many of the decisions are difficult to harmonize. Nevertheless, some general guidance is available. Generally, a person with a direct interest in establishing the will is an interested witness. Thus, a beneficiary under the will would be an interested witness, as could be an executor under the will. In addition, the spouse of an interested witness is similarly deemed interested in many states. In states that disallow interested witnesses, if even one of the two necessary witnesses is interested, the will could fail for lack of formalities. Most of the states with restrictions on interested witnesses have some type of "purging statute." Where they exist, purging statutes provide that the will is valid to dispose of the testator's property. However, the interested witness's devise therein is forfeited to one extent or another. The degree of forfeiture ranges from total forfeiture of the devise to the interested witness to forfeiture of only the amount of the devise that exceeds the amount that the interested witnesses would have obtained if the will had not been probated (e.g., if the property had passed via intestacy or by an earlier will).

The following states have purging statutes that provide for complete forfeiture of any devise to an interested witness (and, in most states, to the spouse of the interested witness): Connecticut; Georgia; Nevada; New Hampshire; North Carolina; and Rhode Island. 5

The District of Columbia and the following 23 states disallow interested witnesses but have a purging statute that provides for an exception to total forfeiture by the interested witness: Arkansas; California; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Massachusetts; Mississippi; Missouri; Nebraska; New York; Ohio; Oklahoma; South Carolina; Tennessee; Texas; Vermont; Washington; West Virginia; Wisconsin; and Wyoming. Generally, the exception to forfeiture is that the will forfeits only that portion of the devise that exceeds the amount that the testator or she would have taken under intestacy or under a previously valid will. For example, if a beneficiary of a $100,000 devise under a final will was also a necessary witness to that will, the will would be valid but the beneficiary/witness

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9 For example, Revised UPC § 2-505 entitled "Who May Witness" provides in subsection (a) that "[l]ocal (civic) organizations generally competent to be a witness may act as a witness to a will." UPC § 2-505 (amended 1993).
would forfeit the amount of the $100,000 devise that exceeds the amount he or she would have received had the property passed by inheritance or the amount designated for him or her in a previous will. If, in a previous will, that beneficiary would have received $80,000, the difference of $20,000 in the final will is forfeited.  

A minority of states have statutorily abolished restrictions on interested witnesses and have adopted the provision of the Original and Revised UPC (or a similar provision) with regard to interested witnesses. The Revised UPC provides that "[t]he signing of the will by an interested witness does not invalidate the will or any provision of it."37 It appears that the following 19 states have statutory provisions similar to UPC § 2-505 allowing interested witnesses: Alabama; Alaska; Arizona; Colorado; Delaware; Florida; Hawaii; Idaho; Maine; Michigan; Minnesota; Montana; New Jersey; New Mexico; North Dakota; Oregon; South Dakota; Utah; and Virginia.38 In addition, both Pennsylvania and Maryland, while not having a statute on point, appear to have by common law allowed interested witnesses to attest to wills.39  

Thus, the majority of states continue to prohibit on the use of interested witnesses. When executing a will for a client, it is the safest course to ensure that the witnesses have no interest in the transaction either directly or by marriage. Even in states that ostensibly allow interested witnesses, they should be avoided. In every case, should a contest ensue, an interested witness's testimony is less credible, because the witness stands to gain from probate of the will.  

c. Dual Requirement for Witnesses  
The attested will statutes require at least two witnesses to sign the will.40 It is important to recognize that this is a conjunctive requirement. A person is not a valid witness if the person did not actually see (i.e., "witness") the event that the statute requires the person to see. Moreover, the statutory requirements are not satisfied if the witness to the event does not sign his or her name on the document. Accordingly, a witness has two separate obligations: (1) he or she must witness; and (2) he or she must sign that he or she witnessed. Both of these obligations must be analyzed in each case.  

(1) Witness Must Actually Witness  
A person is not a witness to a will if the person did not actually witness the event required to be witnessed in the

37 UPC § 2-505(b) (amended 1991).
39 Restatement (Third) of Property § 3.1, statutory note § 8 (1999) (citing Letech v. Letech, 79 A. 600 (Me. 1911)).
40 Pennsylvania has a unique statute that only technically requires witnesses when the testator's name is signed by proxy. Pa. Cons. Stat. Ann. § 2003. Montana also has a unique statute that provides that if two individuals do not properly witnessed the document, the propenent of the document may establish by clear and convincing evidence that the decedent intended the document to be the decedent's will. See In re Estate of Hall, 51 P.3d 1134, 1135 (Mont. 2002) (will was valid despite absence of witnesses (citing Mont. Code Ann. § 72-2-523 (2002)).
41 In states allowing the testator's name to be signed by proxy, where a proxy signature takes place, the witnesses must witness the testator's name being signed by proxy; in some cases, the testator's acknowledgment that the proxy had signed in the testator's presence and direction.
43 Id. at 1050.
44 755 SLC 568-A.
45 Lam, 699 N.E.2d at 1051.
46 Pope v. Clark, 551 So. 2d 1053 (Ala. 1989).
violate a “technicality” as argued by the document's proponents but rather failed to satisfy the “minimum formalities” required under the revised Alabama Code.

In the New Jersey case of In re Estate of Peters,76 the signing of the witnesses’ signatures also caused the will to fail. While Peters, the testator, was in the hospital, his will was executed without the signature of any witnesses. At the time of signing by the testator, the testator’s wife, his sister-in-law, who also served as the notary, and her husband were in the room. Subsequently, two employees who were to act as witnesses to the will entered the room and witnessed the testator’s acknowledgment of his signature. The testator’s sister-in-law then notarized the will in front of both of the employee-witnesses. The two employees, who were in a hurry to return to work, left the room without signing their names to the will. The will was not signed by witnesses until 18 months after the execution ceremony. The wills statute in New Jersey at the time (based on the Original UPC) required that the will “be signed by at least two persons who witnessed” the testator’s signing or acknowledgment of his or her signature or acknowledgment of the will.77 The New Jersey court was left to determine whether the signing 18 months after execution complied with the “signed” by requirement of the statute. The court determined that the statute had not been complied with and refused to probate the will. The court discussed the possibility of adopting a substantial compliance or liberal reading of the statute to validate the will, but determined not to do so. The court reasoned that the New Jersey legislature had reduced the statutory formalities to a minimum by adopting the UPC and that such a reduction of formalities is designed to serve as an alternative method for preserving testators’ intent in New Jersey. The court went on to reason that it had to strictly construe the few remaining formalities. Applying this analysis to the facts, the court determined that the witnesses signing 18 months after execution did not satisfy the witness signing requirement of the statute. The court made a point of stating that the failure stemmed not from the fact that the witnesses signed after the death of the testator, but that they signed the will 18 months after execution.

The Revised UPC in effect codifies the Peters approach and provides that witnesses must sign within a reasonable time. The following 11 states have adopted the Revised UPC’s provisions that a will must sign within a reasonable time: Alaska; Arizona; Colorado; Hawaii; Michigan; Minnesota; Montana; New Jersey; North Dakota; Utah; and Wisconsin.78

In In re Estate of Jung,79 an Arizona court held that a witness who signed subsequent to the testator’s death satisfied the requirement that he sign within a reasonable time. The court questioned the comments following § 2-502 of the Revised UPC that permit a witness to sign after the death of the testator.80 The court noted that the Arizona legislature had recently amended the execution statute in “order to conform Arizona law with revisions made to the Uniform Probate Code in 1990.”81 Accordingly, the court held that in adopting the Revised UPC, the legislators adopted the comments following § 2-502 by extension, which provide that there is “no requirement that the witnesses sign before the testator’s death; in a given case, a reasonable-time requirement could be satisfied even if the witnesses sign after the testator’s death.”82 The court reversed the lower court’s decision that a reasonable time never extends beyond the testator’s death and remanded to allow the fact finder to decide whether the witness signed within a reasonable time.

By contrast, the California Supreme Court, in Estate of Sawyer83 held that a signature of a witness that was made after the death of the testator was not valid. The court explained that, with the exception of the addition permitting a conservator to sign on the testator’s behalf, California’s execution statute had not changed since 1983. In other words, the Revised UPC’s “reasonable time” language had not been adopted by the California legislature. In light of the legislative history, the court held that the comments to § 2-505 of the Revised UPC that allowed a witness to sign after the testator’s death did not apply in California. The court distinguished its holding from the Arizona court’s holding in large part because the Arizona state legislature, unlike California’s, had adopted the Revised UPC.84

Most states do not insist that the witnesses’ signatures appear in any particular location on the document. However, New York and Oklahoma require that the witnesses’ signatures appear at the end of the document.85 In addition, Louisiana requires the witnesses to sign a declaration explaining exactly what was witnessed.86

An issue may also arise with regard to the validity of a witness’s signature when the signature is found only on the self-proving affidavit and not the will itself.87 In a case before

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76 109 P3d at 101.
78 Id. at 100-01 (citing UPC § 2-502 cent. (amended 1993)).
79 824-3rd
80 Changes and Analysis of New Developments in the front of this portfolio
82 ISBN 978-1-11746-948-0
83 2006 WL 1316883 (Cal. 2006).
84 Id. at 206. The court noted that the comment that persuaded the Arizona court was not “before the Legislature when it enacted section 610” in 1983, and “nothing in the legislative history of the enactment, amendment, or extension of section 610 refers to this comment or contains any similar language regarding postdeath annotation.” Id. The court also discussed holdings reached in other jurisdictions with respect to the signing of a witness’s signature. Id. at 205 (quoting In re Estate of Flicker, 339 N.W.2d 914 (Neb. 1983) ("permitting witnesses to sign a will after the death of a testator would erode the effict of the witnessing requirement as a safeguard against fraud or mistake"); In re Estate of Rossi, 262 P.2d 1236, 1238-1239 (Colo. 1953) (adopting a “bright line rule that witnesses’ signatures should be affixed to the document at least by the time it becomes operative, the death of the testator.”). See also In re Estate of Mihalek, 362 N.W.2d 906, 910-11 (Mich. Ct. App. 1985); Roger v. Rogers, 591 P.2d 114, 119 (Ok. Ct. App. 1984). Cf. In re Estate of Miller, 149 P.3d 840 (Neb. 2006) (will not invalidated because one witness did not sign until after testator’s death; court declined to adopt requirement that witnesses must sign within reasonable time after witnessing or at least before testator’s death).
87 136 P3d 201 (Col. 2006).
88 Id. at 100-01 (citing UPC § 2-502 cent. (amended 1993)).
90 Id. at 100-01 (citing UPC § 2-502 cent. (amended 1993)).
the Iowa Supreme Court, in re Estate of Fontenot, the testator signed at the end of the dispositive provisions and on the attached self-proving affidavit. However, the witnesses only signed the latter. The court held that witnesses’ signatures on the self-proving affidavit were sufficient to satisfy the formalities of execution because the signatures “appear[ed] on a document attached to the dispositive provisions of the will.”

The Supreme Court of Nevada, in In re Estate of Friedman, reached a similar conclusion. The Friedman court held that although the witnessed’s “signature is not contained on the ... will where [the testator] signed, but rather on [the] self-proving affidavit attached to the will ... we conclude that under the circumstances of this case, [the witness’s] signature on the affidavit may be considered a signature on the will itself.

3. The Statutory Presence Requirement

Execution statutes vary as to which acts must be performed in the presence of others in order to satisfy the statute. There are a maximum of four presence requirements:51

- The testator’s signature or acknowledgment must be in the presence of at least two attesting witnesses.
- Attesting witnesses must sign in the presence of the testator.
- Attesting witnesses must sign in the presence of each other.
- If the testator’s name is signed by someone else, that proxy signature must be in the testator’s presence and direction.

Some states (such as Florida) require that all four presence requirements be satisfied for the will to be valid.52 Other states have abolished one or more of the presence requirements.53 The only presence requirement maintained in all U.S. jurisdictions is the requirement that a proxy signature be made in the testator’s presence and at his or her direction.

Comment: A practitioner should note that even if a jurisdiction does not expressly require the witnesses to satisfy the presence requirement, the witnesses must nonetheless observe the events necessary in order to comply with the execution requirements of the statute.

In In re Estate of McDevitt, the will was in question was properly attested by one witness but the second witness signed outside the presence of the testator. The Mississippi Court of Appeals refused to salvage the effectively executed will, stating that the attestation requirement was an “indispensable safeguard” to the integrity of testamentary instruments.54

A secondary issue is that the term “presence” is not defined the same way in all jurisdictions. States may use either of two tests to determine whether the requisite presence existed: (1) the “line-of-sight” test; or (2) the “conscious presence” test. The policy behind both tests is to prevent the substitution or alteration of the will.

Under the line-of-sight test, the presence requirement is only satisfied if the testator is capable of seeing the witnesses in the act of signing. The same analysis would apply to the other presence requirements. Each party must be capable of seeing the other in the act of signing.

Under the line-of-sight test, the testator does not actually have to see the witnesses sign, but must be able to see if the testator were to look at the witnesses in the act of signing. Accordingly, the testator can blink or even close his or her eyes to rest, but he or she must be able to see if he or she opens his or her eyes. If something is blocking his or her view, for example, a post or a high desk, or if he or she stands up and looks out the window when the witnesses are signing, then the line-of-sight test is not satisfied.

Even in line-of-sight jurisdictions, an exception is made for blind testators. For a blind person, courts in line-of-sight jurisdictions will usually hold that, if the blind person is conscious of what is going on around him or her, attestation made within his or her range of touch and hearing is valid.

The “conscious presence” test is satisfied if the person can sense the presence of another, such that he or he knows that the other is in the act of signing. In conscious presence jurisdictions, consciousness of the fact that the attesting signatures are being written is an indispensable requirement. It is not sufficient to know that others are in the room; the relevant party must know the other is signing. For example, the presence requirement that attesting witnesses sign in the presence of the testator is met under the “conscious presence” test when the subscribing and attesting witnesses are within the testator’s range of senses, or, for example, when the testator is capable of hearing and understanding that the witnesses are in the act of signing the will at the time they are doing so. This test is satisfied if the person can sense the presence of another, without seeing him or her, such that he or she knows that the other is signing.

If, for example, a testator can, from his or her position in the room, only see the back of the witness, but can hear the papers rustling, the act should be acceptable under the con-
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scious presence test. Similarly, if there is a deck blocking the testator’s view but the testator otherwise can tell (by his or her other senses) that the witnesses are signing, the conscious presence test is probably satisfied.

Comment: In executing a client’s will, a practitioner uses maximum formalities. To avoid presence and line-of-sight problems, the attorney should ensure that all the necessary parties are in the room during the entire execution ceremony, and that they are seated such as to see each other at all times. Optimally, every one should sit around a small table (preferably a round conference table in a windowless room) where they can see each other. It is actually important that none of the participants looks out the window. The attorney supervising the execution of the will should not let anyone out of the room once the ceremony has begun and should have all disturbances removed.

4. Publication

A few states have some sort of “publication” requirement. The will execution statutes of Arkansas, Iowa, Louisiana, New York, and Oklahoma require the testator to “publish” or “declare” that the document is his or her will.60 In Pennsylvania, a testator must declare the instrument is his or her will when the will is signed by proxy.61 The New Hampshire statute requires the testator to “request” the witnesses to attest to his or her signature.62 In addition, both Indiana and Tennessee require the testator to signify to the attesting witnesses that the instrument is his or her will.63 The California statute requires the witnesses to understand that the document is a will.64 In some states, statements made by the supervising attorney with some form of assent by the testator are deemed sufficient.

None of the publication or declaration statutes requires the testator to divulge to the attesting witnesses the terms of the will. On the other hand, each of these statutes clearly requires the witnesses to be made aware of the fact that the document is the testator’s will.65 The statutes vary in terms of what actions must be made by the testator, as opposed to others (such as the supervising attorney), to signify that the document is his or her will.

Comment: Practitioners should be aware of a quirk in some self-proof forms and statutes regarding publishing or declaration. Some state statutes that do not require the testator to declare the document to be his or her will nevertheless have self-proof statutory forms stating such declaration. Thus, in order to comply with the proposed statutory self-proof form, the execution of the will would have required the testator to declare the document to be his or her will. For example, the Florida wills execution statute [§ 732.502] does not require that the testator publish, declare or signify that the document is his or her will. Nevertheless, Florida’s statutory self-proof form [§ 732.503] provides that the witnesses must state under oath that “the testator declared the instrument to be the testator’s will.”66

5. Choice of Law

In executing a will, the executing attorney cannot rely solely on the formalities required by the statute in the client’s state of domicile at execution. In our highly mobile society, the client’s will may be offered for probate in another state. The client may die domiciled in another state or may own real property in another state at death.67

Under the common law choice of law rules, the law of the decedent’s domicile at death determines the validity of the will for disposing of personal property, whereas the law of the state where real property is located determines the validity of a disposition of such real property.68

Almost all states, however, have some type of a choice of law provision — some more generous than others — that serves to validate a will executed under the laws of another state.

Twenty states (Alabama, Alaska, Arizona, California, Colorado, Delaware, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, South Dakota, Utah, and Wyoming) have adopted the broad choice of law statute of UPC § 2-506, which provides that a written will is valid.69 If its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national. Thus, the UPC would recognize as valid a written will that was executed with the formalities required.

— at the time of will execution by the jurisdiction where the will was executed;
— at the time of will execution by the jurisdiction of the testator’s domicile, abode or nationality; or
— at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.

An additional eight states, while paterning their statutes after UPC § 2-506, have slightly modified their statutes. Indi-

65 In Fault v. Bogdan, 682 S.W.2d 239, 241 (Ark. 1985), the court explained that publication “means that the testator, having capacity to make a will, shall understand that the instrument which he is about to execute, is a testamentary disposition of his property, and that he shall, at the time, communicate to the witnesses that he does understand it.” (quoting Rogers v. Diamond, 13 Ark. 474 (1853)).
68 Id. at 167-68.
70 UPC § 2-506 (amended 1993).

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ana, New York, Oregon, South Carolina, and Washington would recognize as valid a written will executed with the formalities of the jurisdiction where the will was executed at the time of the execution, or of the testator’s domicile at the time of execution or death. These five states do not recognize wills executed under the jurisdiction of the testator’s abode or nationality. The remaining three states — Kansas, New Mexico, and Wisconsin — with choice of law rules patterned after, but not identical to, UPC § 2-506 have similar variations. While generally following UPC § 2-506, Kansas would recognize the jurisdiction of the place of the testator’s residence (excluding the place of domicile, abode, or nationality); New Mexico, while excluding the testator’s abode, would recognize the jurisdiction of the testator’s domicile or nationality; and Wisconsin would recognize the jurisdiction of the place of the testator’s residence, domicile, or nationality (again excluding abode). Other states have nonuniform choice of law statutes that are not patterned after the UPC and that are somewhat less generous than the UPC version. Some of the nonuniform statutes restrict their choice of law statutes to wills valid under the law at the time of execution and disregard the law at the time of death. Other nonuniform statutes restrict their choice of law statutes to wills valid under the law at the date of death, not at the time of execution. Finally, other nonuniform statutes are variations of one of these.

The following 10 states have nonuniform choice of law statutes that provide generally that a will executed outside the state is valid, if it was validly executed according to the laws of either: (1) the jurisdiction where the will was executed or (2) the jurisdiction of the testator’s domicile at the time of execution: Arkansas; Illinois; Iowa; Louisiana; Maryland; Nevada; Oklahoma; Rhode Island; Tennessee; and Vermont. Three states (Kentucky, Virginia, and West Virginia) provide generally that a will is valid if executed according to the law of the state of the testator’s domicile at the time of execution (disregarding the law of the state of execution). In Pennsylvania, a will is valid if executed according to the law of the testator’s domicile at the time of execution or at the time of death. Some of these statutes, however, have certain exceptions. For example, both Virginia and West Virginia’s choice of law statutes are limited to personal property within the state.

Three states (Connecticut, Florida, and New Hampshire) have choice of law statutes that provide that the will is valid if executed under the laws of the state at the time of execution only of the jurisdiction where the will was executed (disregarding the law of the testator’s domicile). Of particular concern, however, is that even states with choice of law statutes sometimes contain exceptions. For example, although Florida generally recognizes wills that were validly executed under the laws of the state of execution, Florida would not recognize as valid a holographic will (i.e., an unattested will in the testator’s handwriting) even if the holographic will would have been valid in the state where executed. Thus, if a New Jersey resident executes a will valid under the laws of New Jersey for witnessed (attested) wills, then retires to Florida without executing a new will, the Florida choice of law statute would provide that the attested will executed under the laws of New Jersey at the time of execution would be valid in Florida. However, if the will written in New Jersey had been a holograph, Florida’s choice of law statute would not recognize that will as valid, even though the holograph would have been valid in the jurisdiction (New Jersey) where executed. Similarly, while the Kansas choice of law statute generally accepts wills that were validly executed under the laws in effect, at the time of execution, of either the place of execution or of the testator’s residence, the Kansas statute contains a proviso that such wills are only valid if in writing and subscribed by the testator. In re Estate of Reel, the Supreme Court of Kansas interpreted the word “subscribed,” as used in the proviso of the choice of law statute as meaning “signed at the end.” Accordingly, the court reasoned that a document executed outside of Kansas would not be entitled to probate in Kansas unless it was signed at the end.

In Georgia and North Carolina, a will is valid only if it complies with the execution requirements of the respective state. Similarly, Ohio law requires compliance with the execution requirements currently in force or in effect at the time of execution in Ohio.

The lack of uniformity among states with regard to the requisite formalities for wills, and the varying types of choice of law statutes, suggest the advisability of complying with the maximum formalities called for by the law of any state when executing a will. A lawyer should, of course, draft wills so that there is no need to resort to a choice of law statute. The careful lawyer in our highly mobile society should draft a will and have it executed in a manner that satisfies the formal requirements in

111 Id.
117 Fla. Stat. § 732.502(2). Fla. Stat. § 732.502(2) provides: “Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida ..., is valid as a will in this state if valid under the laws of the state or country where the will was executed.” (Emphasis added.)
A will executed without this state in the manner prescribed by this act, or by the law of the place of its execution, or by the law of the testator’s residence either at the time of its execution or at the time of the testator’s death, shall be deemed to be legally executed, and shall have the same force and effect as if executed in compliance with the provisions of this act. Provided, Said will is in writing and subscribed by the testator.
120 Id. at 652.
121 13 Va. Code Ann. § 55.3-31; N.C. Gen. Stat. § 31-3.1 (“No will is valid unless it complies with the requirements prescribed therein by this Article.”).
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all states. This is yet another reason, as emphasized throughout this Portfolio, to err on the side of over-inclusiveness when considering what mechanical requirements to incorporate into the will execution ceremony.

6. Compliance

Almost all states require strict compliance with will formalities. Strict compliance means that even one violation of an execution requirement, no matter how technical, invalidates the will.

Several states, however, have enacted statutes that allow courts to excuse a harmless error in will execution.113 The statutes generally allow a will executed with a harmless error to be admitted if the proponent of the will establishes, by clear and convincing evidence, that the document was intended by the testator to be his or her will. These statutes are derived from Revised UCP § 2-503. That provision states the following:114

Section 2-503, Harmless Error.

Although a document or writing added upon a document was not executed in compliance with Section 2-502 [the attested and holographic will provisions], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revocation of his [or her] formerly revoked will or of a formerly revoked portion of the will.

Because the harmless error statute has not been adopted by many states, there are few cases that have interpreted such a statute.115

The Supreme Court of Montana, in In re Estate of Brooks,116 was called on to apply the state’s harmless error statute to a will that failed to comply with the formalities of Montana’s execution statute. Despite the existence of the harmless error statute, the court declined to admit the purported will into probate. In that case, the testatrix had attempted to execute what the court referred to as a “home-drawn” will that left the bulk of her estate to her son.117 The testatrix’s son sought admission of the purported will to probate, but the testatrix’s daughter requested that the will not be admitted to probate so that the estate would be distributed via intestacy. The document clearly failed to satisfy the formal execution requirements of Mont. Code Ann. § 72-2-522, for lack of two witnesses. Although the document contained two signatures on the lines for witnesses, one of the purported witnesses was not present when the testatrix signed the document, and the testatrix never acknowledged to that person either her signature on the document or that the document was her will.

The Montana Supreme Court recognized, however, that in Montana, absent due execution, a will could still be admitted to probate if it complied with the harmless error statute. The Montana harmless error statute, Mont. Code Ann. § 72-2-523, is patterned after Revised UCP § 2-503 and provides that:118

[although a document or writing . . . was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent’s will . . .]

The Brooks court interpreted its harmless error statute as requiring the proponent of the will to prove by clear and convincing evidence not just that the document was intended to be the testatrix’s will but also that the testatrix was of sound mind.119 The court acknowledged that in cases where a will is executed in conformity with the formalities of Mont. Code Ann. § 72-2-522, the proponent of the will is entitled to a presumption of testamentary capacity. However, the court reasoned, formal will cases differ from those that rely on the harmless error statute for admission to probate. Accordingly, the court stated that in cases that rely on the harmless error statute, no presumption of capacity exists, and the proponent must prove testamentary capacity by clear and convincing evidence.

In an attempt to satisfy this high burden on capacity, the proponent of the will (the testatrix’s son) introduced an audio tape recording of a conversation he had with his mother about the will. The Brooks court did not, however, find that the recording helped establish capacity.120 Rather, the Montana Supreme Court agreed with the lower court that the tape demonstrated that the testatrix’s cognitive functioning may have been impaired, since the testatrix laughed during the taping and, in response to a question on handling certain stocks, stated that “[she was] no good at that kind of thing.”121 After weighing all the evidence on capacity, the Montana Supreme Court determined that the proponent had not established by clear and convincing evidence that the testatrix had testamentary capacity at will execution and, accordingly, refused to admit the document to probate.

A court of appeals in Colorado also applied a harmless error statute modeled after the Revised UCP in In re Estate of Dancer.122 The will consisted of several only one of which contained “testamentary text.” This key document was typewritten and not signed by the testator or any witnesses. Furthermore, the proponent of the will provided no evidence

114 UCP § 2-503 (amended 1993).
117 Id. at 1015.
119 Id. at 1027–28.
120 Id. (concluding that the testatrix did not have the “clearest of mind and memory to know, in general, without prompting, the nature and extent of her property.”).
121 Id.

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that the testator had told anyone that the document at issue was his will. The decedent’s beneficiary argued that the document should be admitted to probate pursuant to Colo. Rev. Stat. § 15-11-503. Colorado’s harmless error statute states that the court explained that by adopting Revised CPC § 2-503, the Colorado legislature meant to permit the courts “to discover and make effective the intent of a decedent in the distribution of his or her property and to promote a speedy and efficient system for settling the estate.” However, in Dancer, the court found that it was “not dealing with a minor deviation from the formal requisites of the preparation or execution of a will” and was instead asked to deem valid a will that was not in the testator’s handwriting or signed by her. Thus, the court did not admit the will. The Colorado legislature has since amended its harmless error statute in effect codifying Dancer. The Colorado harmless error statute requires the will to have been signed or acknowledged by the testator. A Colorado court explained that “§ 15-11-503(3) establishes the condition precedent that a document be signed or acknowledged by the decedent as his or her will before a court may move to the next step and decide whether there is clear and convincing evidence the decedent intended the document to be a will.”

New Jersey’s harmless error statute, N.J. Stat. Ann § 3B:3-3, was effectively invoked to allow probate of an unsigned and untested will. In In re Estate of Bylch, the decedent was a trust and estates attorney who drafted his own will. Upon the decedent’s death, a signed will was not found, but an unsigned copy of a will, typed on legal paper with the decedent’s name and law office address printed thereon, was found with a handwritten note on the first page stating that the original had been sent to the executor and trustee named in the will. The court found that there was clear and convincing evidence that the decedent intended the document to be his will. The court noted that the distribution of the bulk of the decedent’s estate in the purported will was to the only living relative with whom the decedent had a close relationship. Further, the court noted that the decedent prepared the document just before he was to undergo life-threatening surgery. Also, the court stated that there was evidence that the decedent acknowledged the will’s existence and its contents prior to his death. Finally, the court found that the decedent had also executed a Power of Attorney and Living Will on the same day that he purportedly mailed the will. Accordingly, the court ruled that the document was properly admitted into probate as the decedent’s will.

In rare cases, in a jurisdiction without a harmless error statute, the proponent of a will with a minor error in execution has prevailed upon a court to admit a will, by convincing the court that the will “substantially complied” with the applicable state’s will execution statute. Under the substantial compliance approach, the court has no statutory support for excusing a failure in the execution requirements of the state’s wills statute. Accordingly, courts are quite hesitant to adopt this theory and rarely do so. Moreover, even jurisdictions that have adopted the theory in some instances generally refuse to apply the theory where the failure involves a significant formality.

For example, Arkansas courts have utilized the substantial compliance theory to admit a will to probate where there was a question as to whether the testator compiled with the state’s publication requirement. Further, Arkansas courts have used the substantial compliance to admit a will when the issue was compliance with the requirement that the witnesses sign “at the request” of the testator. The Arkansas courts have also found that the testator had substantially complied with the execution statute even though the testator’s signature was not at the end of the document. However, the Arkansas Supreme Court, in Burns v. Adamson, expressly refused to use substantial compliance to validate a will where one of the purported witnesses signed a blank document hours before the testatrix signed the instrument. In that case, the Arkansas court had little difficulty concluding that the witnessing of a blank instrument several hours before the testatrix’s signature simply did not comply with the Arkansas execution statute specifically requiring that the testator’s signing (or acknowledgment of his or her signature) be “in the presence of” two attesting witnesses. The court explained that “[w]hile we have found substantial compliance in some situations, we have never extended it to allow a witness to attest a will before the testator signs it and who in fact never sees the testator sign.”

Courts in other jurisdictions have also used the theory of substantial compliance to validate a will absent a harmless error statute. In In re Estate of Frank, the court held that the publication requirement was satisfied even though the testator did not expressly declare the will to be his. Instead, the drafter of the will “announced to the subscribing witnesses, in the decedent’s presence, that the decedent was executing a will.”

An Oklahoma court reached a similar conclusion with respect to the publication requirement found in Okla. Stat. Ann. tit. 84, § 55. In Moody, the testator did not directly “declare to the attesting witnesses that the instrument” was his will. Instead, the first witness, Evelyn Pyeat, overheard the testator ask a co-worker to witness his will. The co-worker declined on account of her advanced age but suggested that Pyeat act as a witness. Subsequently the co-worker brought the testator over to Pyeat who saw the testator sign the will. The second witness

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123 Id. at 1233-34.
124 Id. at 1254.
125 In re Estate of Witting, 146 P.3d 465, 468 (Colo. Ct. App. 2006).
127 Id. at 1232-34.
131 854 S.W.2d 723 (Ark. 1993).
132 Id. at 724.
133 Id. at 723-24. See also In re Estate of McDevitt, 755 So. 2d 1123 (Miss. Ct. App. 1999) (substantial compliance theory rejected where witness signed outside presence of testator).
136 Id. at 894. In addition, another New York court explained that, with respect to the publication requirement, “substantial compliance will be sufficient and no particular form of words is required, or necessary, to effect publication.” In re Estate of Pinon, 9 A.D.3d 771, 772 (N.Y. App. Div. 2004) (quoting In re Tarnoff’s Will, 50 N.E. 910 (N.Y. 1901)). In Pinon “the surrounding circumstances were sufficient to bring home to [the witnesses] that the writing was a will and that they were being asked to sign it as witnesses.” Id. at 773.
138 Id. at 350.
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7. Self-Proving Affidavit

The self-proving affidavit memorializes and records the events of execution in a sworn document. The self-proving affidavit is designed to make it unnecessary to locate the witnesses at the testator’s death. A self-proving affidavit can be confused with an attestation clause, which often includes similar language, but is an unsworn statement. With the exception of the District of Columbia, Louisiana, Maryland, Ohio, and Vermont, every state has a statute that provides that a will may be made self-proving. Moreover, many of these statutes include forms for the self-proving affidavit.138

The purpose of this affidavit is to allow a will to be admitted to probate “without the testimony of any subscribing witnesses.”139 This benefit is important considering witnesses may have moved, died, become incompetent, or may be difficult to find after the death of the testator.

As a practical matter, issues arise when the self-proof affidavit statute is not properly followed. Both the Original and Revised UPC provide for self-proved wills in § 2-504. Pursuant to the Original and Revised UPC, the following procedure should be followed when executing a self-proving affidavit.

First, an officer authorized to administer oaths, usually a notary public, places the testator and witnesses under oath. Next, the testator signs and dates the self-proof form provided by UPC § 2-504 and “declares” to the notary that “I sign and execute this instrument as my last will . . . I sign it willingly . . . I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.” Third, the witnesses each sign the self-proof form and declare “that the testator signs and executes this instrument as [his or her] last will and that [he or she] signs willingly . . . is eighteen years of age or older, of sound mind, and under no constraint or undue influence . . . and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator’s signing.” Finally, the notary public signs and seals the self-proving affidavit.

The UPC’s self-proving statute includes formalities that are absent from UPC § 2-502, the UPC’s execution statute. There are two types of formalities listed in UPC § 2-504 (the self-proof statute) — those that are required when executing the will and those required when executing the self-proving affidavit. For example, when a witness signs the self-proof affidavit, he or she swears under oath that he or she signed the will — not the self-proving affidavit — in the “presence and hearing” of the testator. However, while UPC § 2-502 (the will execution statute) requires the will be signed “by at least two individuals, each of whom signed within a reasonable time,” it does not require the witness to sign in the presence of the testator. Therefore, in order to have a valid self-proved will, the witness must sign the will in the testator’s presence, otherwise his or her sworn affidavit would be false.

There are also formalities required when executing the self-proving affidavit itself. For example, both the testator and the witnesses are required to make declarations when executing the affidavit. However, the parties do not swear that they made any declarations when executing the will. In In re Estate of Farr,140 notwithstanding the parties failure to adhere to the heightened formalities required by the self-proving affidavit, the will was admitted to probate. The court explained that “if a will containing a self-proving affidavit is contested, the will is treated as if it contained no such affidavit.” In Kansas, the self-proving statute requires the parties to be under oath and the testator to declare, while executing the affidavit, that the will is theirs and that he or she signed and executed the will voluntarily. The testator in Farr did not make the proper declarations and the witnesses were not under oath when signing the self-proof affidavit. However, the court explained, the validity of the affidavit was moot because “testimony of both subscribing witnesses was received into evidence at trial and was used by the trial court in admitting the will to probate.”

A valid self-proof affidavit creates a prima facie case of due execution. For example, in Sroup v. Leiper141 a Missouri court put forth the proposition that a prima facie case is made for due execution if the will is self-proving.

Although the self-proved will makes it easier on the proponent of the will, the contestant may still rebut the presumption of due execution in some circumstances. However, one aspect of execution that may generally not be rebutted is the signature requirement. Revised UPC § 3-406(b) provides:

(b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

The comments following this provision explain that a conclusive presumption “would foreclose questions like whether the witnesses signed in the presence of the testator.” Consistent with this provision, the comments following Revised UPC § 2-504 provide that “a self-proved will may be contested (except in regard to signature requirements).”

In In re Estate of Zenko,142 the contestant of the will challenged the signatures notwithstanding that the will contained a self-proving affidavit properly executed pursuant to Minn. Stat.

138 id. at 350.
140 A self-proved will may be admitted to probate . . . without the testimony of any subscribing witness, but otherwise it is treated not differently from a will not so proved.” UPC § 2-504 cmt. (amended 1990).
141 49 P.3d 415 (Kan. 2002).
142 981 S.W.2d 689 (Mo. Ct. App. 1999).
143 672 N.W.2d 574 (Minn. Ct. App. 2003).

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Ann. § 524.2-504. The will, which named one of the testator's nine grandchildren as sole beneficiary, and the self-proving affidavit were signed by the testator and both witnesses. Furthermore, the self-proof affidavit was duly sworn and notarized. After the death of the testator, another grandchild challenged the will, claiming it was not properly executed under Minn. Stat. Ann. § 524.2-502, specifically because the testator did not sign or acknowledge her signature in the presence of the witnesses as was required by the will execution statute. In support of this argument, one of the witnesses to the will testified that the testator signed the will in another room with her attorney who then brought the document into the room occupied by the witnesses in order to have them sign. Notwithstanding this testimony, the court held that the self-proving affidavit proved that the will was properly executed. The court pointed to Minn. Stat. Ann. § 524.1-406(6), which provided that, with respect to a self-proved will, "compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal." The court defined a conclusive presumption as "a presumption that cannot be overcome by any additional evidence or argument." Applying these rules to the facts at hand, the court held that "questions concerning whether the witnesses signed in the presence of the testator are precluded." Accordingly, the court disregarded the testimony of the witness that the testator signed in another room and admitted the will to probate.

The self-proving affidavit can sometimes cure a defect in the will itself. This was not always the case. Courts in Texas, Washington, and Montana have held that the self-proving affidavit was "not a part of the will but concerned the matter of its proof only."144 In drafting the Revised UPC, the authors took the opportunity to overrule these holdings. UPC § 2-504 was expanded to include subsection (c), which provides that "a signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution." The comments explain that the new provision was added to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will in cases where the testator or witnesses got confused and only signed on the self-proving affidavit.

The following states allow a signature on the self-proving affidavit to cure a missing signature on the will itself: Alaska, Arizona, Colorado; Hawaii; Indiana; Kentucky; Michigan; Minnesota; Montana; Nevada; New Mexico; North Dakota; South Dakota; Texas; Utah; Wisconsin; and Wyoming.145 In the following states, the courts, rather than the legislators, have adopted the rule that a defect in a will may be cured by the self-proving affidavit: Delaware; Florida; Georgia; Indiana; Iowa; Kansas; New Jersey; New York; Oklahoma and Washington.146

D. A Note on Notarial, Holographic, and Nuncupative Wills

Some states have alternatives to witnessed wills. These alternatives are notarial wills, holographic wills, and nuncupative wills.

1. Notarial Wills

The 2008 amendments to the UPC provided for notarized wills as an alternative to witnessed wills.147 Colorado148 and North Dakota149 have adopted this notarial will option. Generally, a notarial will must be in writing, signed by the testator, and acknowledged by the testator before a notary public or other person authorized by law to take such acknowledgment.

2. Holographic Wills

In light of the formalities necessary for an attested will or notarial will to be valid, it is somewhat ironic that slightly more than half of the states permit holographic wills to be probated. A holographic will is generally an unwitnessed will that is signed and handwritten by the testator. Although a planning attorney would not suggest that a testator execute a will as a holograph, it is important for an attorney engaged in probate litigation to recognize that a large number of the states consider holographic wills to be validly executed testaments.

Holographic wills require compliance with their respective state statutes in order to be valid. The requirements for them to be valid vary from state to state.150 In the most restrictive states that allow holographs, the statutes require that the holograph be entirely written, dated, and signed by the testator.151 Where such a statute is interpreted strictly, any typewritten or stamped language on the document invalidates the holograph. The harshness of an "entirely written by the testator" holograph statute may be alleviated if the courts in the jurisdiction apply...
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what is referred to as the surpluses theory.143 In Tealbert, the Supreme Court of Appeals of West Virginia stated that, “[o]nly the surpluses theory, non-bonded material in a holographic will may be stricken with the remainder of the instrument being admitted to probate if the remaining provisions make sense standing alone.”144 According to the Supreme Court of Arizona, a jurisdiction that has adopted the surpluses theory, “[n]o sound purpose or policy is served by invalidating a holograph where every statutorily required element of the will is concealedly expressed in the testator’s own handwriting and where her testamentary intent is clearly revealed in the words as she wrote them.”145

Other jurisdictions accepting holographs have more liberal statutes. Some states have holograph statutes patterned after Original UPC § 2-503, which provides that “[a] will which does not comply with [the requirements for an attested will] is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.”146

Generally, a jurisdiction with a “material provisions” holograph statute patterned after the Original UPC allows holographs to be valid even though the instrument contains pre-printed non-handwritten language. Such a jurisdiction would require, however, that the words displaying the testator’s testamentary intent be in the testator’s handwriting; thus, for example, a fill-in-the-blank form that said, “I hereby bequeath to ______,” which the testator filled in, would not be a valid holograph because the testator did not write the words that evidenced his or her testamentary intent.

The Revised UPC has liberalized the holograph requirements further. Revised UPC § 2-502(b) and (c) provides:147

(b) A will that does not comply with [the requirements for an attested will] is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

(c) Intent that the document constitutes the testator’s will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator’s handwriting.

The official comments to the Revised UPC note that by requiring only that the “material portions” of the document be in the testator’s handwriting (rather than the entire document), a holograph can be valid even if immaterial parts such as a date or introductory wording are printed, typed, or stamped.148 The addition of Revised UPC § 2-503(c) to the holograph provision of the Revised UPC was designed to allow a court to admit extrinsic evidence, such as the pre-printed language on a pre-printed will form, to establish testamentary intent.

3. Nuncupative Wills

In addition to holographic wills, in some states certain oral wills, typically referred to as nuncupative wills, are recognized. A nuncupative will is generally understood as one that is declared orally by the testator in the presence of witnesses.149 Nuncupative wills are, however, typically allowed only under special circumstances, such as the testator’s last illness. For example, in Kansas, a nuncupative will may be recognized to transfer personal property if made by the testator in his or her last sickness as long as it was “reduced to writing and subscribed by two competent, disinterested witnesses within thirty days after the speaking of the testamentary words.”150 In New York, however, a nuncupative will is recognized only for those serving in the armed services during an armed conflict (plus mariners at sea), and the will becomes void one year after discharge (or three years after the will was made, for mariners).151 Many nuncupative will statutes only apply for the purpose of disposing of limited amounts of personal property.

In the state survey, set forth in II, F, below, notarial and holographic will statutes are noted but, because of their limited utility and availability, this Portfolio does not further address nuncupative wills.

II. Suggested Will Formalities

In light of the different formalities required in the various states for the execution of a will, the goal of execution is to use many formalities as needed to obtain the maximum acceptability of the will in the various states. The Restatement (Second) of Property describes the “gold standard” for the proper execution of a will.152 The Restatement suggests eight steps that, if followed in executing a will, should serve to provide maximum acceptance of the will in the various states.153 Each and every step is vital, and they must be performed in the order in which they appear below. Most practitioners insist on an addi-

143 See In re Estate of Tealbert, 298 I.E.2d 454 (W. Va. 1982).
144 Id. at 459. See also Berry v. Triple, 625 S.E.2d 440 (Va. 2006) (unpublished holographic will is invalid if handwritten entries are interwoven with or joined to typewritten material or continue from typewritten material in physical form, by reference or in sequence of thought, holographic will may only be established upon consideration of all handwritten entries by testator on document and not upon consideration of only portions of handwritten entries selected by will’s proponent).
148 See, e.g., State v. Black, 484 N.E.2d 259 (Ind. Ct. App. 1985) (holding that a will that is not self-executing should not be admitted to probate).
149 Restatement (Second) of Property § 3.3 (1990).
150 Id.

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tional step — the self-proving affidavit — in each case. Set forth below are the requirements of the Restatement, modified to accommodate a self-proving affidavit.\textsuperscript{104} Comments are set forth after each step to explain or expand upon the steps where necessary. These procedures are designed to satisfy the mechanical elements of formalities for the various states. As discussed below, following maximum formalities can also serve to minimize future litigation over the mental elements of the will.

Step 1. The testator should examine the will in its entirety and the lawyer should make certain that the testator understands the terms of the will.

Comment: In determining whether the testator understands the terms of the will, the attorney should think carefully, before execution, whether additional precautions are warranted. The attorney should carefully review the testator’s plan and the will to determine if any warning signs are evident. Warning signs may arise from a review of the dispositive provisions of the will. If, for example, the testator is disinheriting someone who may be deemed a natural object of his or her bounty, a concern arises. Alternatively, if the will leaves substantial property to a non-relative with a short history of a connection to the testator, a disgruntled heir may appear. Similarly, a will with terms that vary considerably from dispositions in previous wills might indicate a possible challenge. Warning signs may also appear from interviewing the testator. If the testator appears weak or infirm, caution is dictated. If, after meeting with and interviewing the client (and perhaps his or her doctors), the attorney does not believe the testator has the requisite capacity, the attorney must not participate in the will execution under any circumstances. If, however, the attorney, after thorough interviews, is confident that the testator (who might be infirm, elderly, or weak) has capacity, the attorney should take extra precautions to minimize a challenge. If warning signs are present, the attorney should carefully consider utilizing additional precautionary steps (discussed in more detail in IV, below), such as recording the execution ceremony, having supernumerary witnesses, and perhaps having doctors’ evaluations on file. To avoid issues about revocation, only one document should be executed. No copies should be executed.

Step 2. The testator and three persons who are to be witnesses to the will and who have no interest vested or contingent in the property disposed of by the testator’s will or in the testator’s estate in the event of an intestacy, along with the lawyer supervising the execution of the will, and a notary should be in a room from which everyone else is excluded. No one should enter or leave this room until the execution of the will is completed.

Comment: Step 2 suggests three witnesses. Many attorneys now reduce the number of witnesses to two when dealing with what appears to be a noncontroversial will. The reason for reducing the number of witnesses to two is that every state now only requires two. Nevertheless, three witnesses is still common practice, primarily because many practitioners find supernumerary witnesses helpful in the event of a challenge. It is advisable to use three if a will contest is expected. In addition, where a contest is expected, special care should be given to choosing the witnesses who would be particularly credible and persuasive in court. Persons who have known the testator for a long time but who are not interested are often chosen. Note that Step 2 clearly provides that each witness must be disinterested. This is critical. A majority of states continue to disallow interested witnesses. Even in the states whose formalities allow interested witnesses, the presence of an interested witness during the execution raises the stakes for a contest on the mental elements. In addition, it is important to ensure that no family members or beneficiaries are present in the room when the will is being executed to avoid any implications of undue influence. The notary is included as a necessary participant for executing a self-proving affidavit. The notary is required for proper execution in Louisiana.\textsuperscript{104}

Step 3. The lawyer supervising the execution of the will should ask the testator the following question: “Do you declare in the presence of [witness 1], [witness 2], and [witness 3] that the document before you is your will, that its terms have been explained to you, and that the document expresses your desires as to the disposition of the property referred to therein on your death?” The testator should answer “yes,” and the answer should be audible to the three witnesses.

Comment: When a will contest based on lack of testamentary capacity is likely, the attorney for the testator should ask the client additional questions to help bolster the claim of capacity.

Step 4. The lawyer supervising the execution of the will should then ask the testator the following question: “Do you request [witness 1], [witness 2], and [witness 3] to witness your signing of your will?” Again, the testator should answer “yes,” and the answer should be audible to the three witnesses.

Comment: The testator must specifically request the witnesses to act as witnesses in some states.\textsuperscript{105} This questioning also serves to comply with the publication requirement of several states.

Step 5. The three witnesses should then be placed so that each can see the testator sign, and the testator should then sign in the space provided for the testator’s signature at the end of the will. The testator should also sign on the bottom of each page of the will.

Comment: To avoid presence and line of vision problems, the attorney should ensure that all the necessary parties are in the room during the entire execution ceremony and that they are seated so they can see each other at all times. Optimally, each of the participants should sit around a small table (preferably a round conference table) where they can see each other. It is actually important that no one decides to stand and look out the window. In some states, it is critical that the witnesses actually see the testator sign the will. In those states, acknowledgment by the testator that he or she previously signed the will is insufficient. As a matter of practice, the attorney should call the witnesses’ attention to the testator’s signing of the will. When the attorney is sure he or she has the witnesses’ attention, the testator should sign his or her name in a standard testimonium clause. The testimonium clause simply provides when.

\textsuperscript{104} In Louisiana, the will formalities require a notary. La. Civ. Code Ann. art. 1577.


\textsuperscript{106} See Ark. Code Ann. § 28-25-103(b).
where, and what was signed. It is typically something to the effect of “this will was signed [subscribed] by me on the ___ day of ____ 20__, at [county/city/][state],” followed by a signature line for the testator. In addition to the testator signing the signature line of the testimonium clause, the common practice is to have the testator sign or initial the bottom of each page of the will. This practice helps to thwart challenges based on substitution of pages. Careful review of each page is necessary, because a skipped page might suggest a problem. The testator must actually sign the bottom of each page for the will to be valid in Louisiana.

Step 6. One of the witnesses should then read aloud the attestation clause, which should provide in substance that the foregoing instrument was signed on such a date by the testator (giving the testator’s name); that the testator requested each of the witnesses to witness his or her signing of the document; that each of the witnesses did witness the signing of the document; that each witness in the presence of the testator and in the presence of the other witnesses does sign as witness, and that each witness does declare the testator to be of sound mind and memory.

Comment: The attestation clause is the part of the ceremony where the witnesses actually bear witness to the event they saw. A proper attestation clause, when signed by the witnesses, raises a rebuttable presumption that the formalities of execution recited therein actually occurred. Reading aloud the attestation clause serves to thwart later claims by a witness that he or she did not understand the clause, the purpose of the ceremony, or the significance of his or her actions. It is important that the attestation clause be accurate. If, for example, the testator’s signature was signed by proxy, the attestation clause should reflect that deviation.

Step 7. Each witness should declare that the attestation clause is a correct statement.

Comment: Having the witnesses both sign and declare that the attestation clause is correct serves as a powerful indication of the propriety of the execution ceremony. The typical attestation clause includes a phrase that the witnesses “believed the testator to be of sound mind at the time of the signing.” While no presumptions regarding the testator’s sound mind are created from this reference in the attestation clause, the reference may serve to discredit or challenge a witness who later changes his or her mind regarding the testator’s state of mind.

Step 8. Each witness should then sign in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two witnesses should be placed so that each one can see the witness sign. Each witness should give an address opposite his or her signature.

Comment: It is not sufficient for the witnesses to simply witness the will; they must actually sign their names to the document for it to be valid. In addition, each witness should provide an address for locating the witnesses in the future.

Step 9. The parties should then observe the formalities necessary to make the will self-proving by executing the self-proving affidavit in front of the notary and ensuring that in states requiring a notebook the notary makes a notation regarding the execution of the will and self-proving affidavit in his or her notebook.

Comment: The self-proving affidavit memorializes and records the events of execution in a sworn document. The self-proving affidavit is designed to make it unnecessary to locate the witnesses at the testator’s death. Many states have statutes that provide that a will may be made self-proving. Moreover, most of the statutes include forms for the self-proving affidavit. Care should be taken to follow the requisite state form; however, caution is advised with regard to some state self-proving statutes. For example, some state statutes provide that the self-proving affidavit and the attestation clauses can be part of the same paragraph, so that the witnesses only need to sign once. This is not recommended, however, because a separate affidavit may be required in another jurisdiction. Thus, the proper practice is to have the parties sign both the attestation clause and the affidavit. Only after the attestation clause is signed should the attorney turn the parties’ attention to the notary and then explain, to the testator and the witnesses, that they are memorializing the ceremony when they execute the self-proving affidavit. Moreover, as with will execution, the preferred practice is to use the procedure of the strictest state for executing the self-proving affidavit, in order to obtain the maximum acceptability for the affidavit. For example, some state self-proving affidavit forms do not require the testator’s signature, while others do. Finally, the attorney should tailor the form self-proving affidavit, when necessary, to reflect unique facts, such as blindness of the testator.

F. Survey of Specific State Execution Requirements

As mentioned above, in light of the migratory nature of clients, a will should be executed with maximum formalities for validity in almost all states. As attorneys, we are often called upon to determine if a particular will has been executed with the requisite formalities of a specific state. This Portfolio sets forth below the formalities necessary for each state and the District of Columbia. When interpreting whether a particular will is valid, it is necessary to examine the will formalities of the specific state.

1. Alabama

Ala. Code § 43-8-131, listing formalities for proper will execution, requires that:

every will shall be in writing signed by the testator or in the testator’s name by some other person in the testator’s presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will.

Set forth below is a quick examination of the specific Alabama will execution requirements:

* Testator’s Signature. The testator must sign the will, but it need not be at the end. Proxy signature is allowed so


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long as it is done in the testator’s presence and at his or her direction.

- Witnesses. Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will.\textsuperscript{166}

- Presence. The only presence requirement is for proxy signature.\textsuperscript{170}

- Publication. No publication or declaration by the testator is required.

- Holograph. Holographic wills are not permitted.

- Choice of Law. The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.\textsuperscript{171}

- Compliance. Alabama has not enacted a harmless error statute.

2. Alaska

Alaska’s probate statute for attested wills tracks Revised UPC § 2-502.

Alaska Stat. § 13.12.502(a) provides that: a will must be: (1) in writing; (2) signed by the testator or in the testator’s name by another individual in the testator’s conscious presence and by the testator’s direction; and (3) signed by at least two individuals, each of whom signs within a reasonable time after the witness witnesses either the signing of the will as described in (2) of this subsection or the testator’s acknowledgment of that signature or the will.

Set forth below is a quick examination of the specific Alaska will execution requirements:

- Testator’s Signature. The testator must sign the will, but it need not be at the end. A proxy signature is allowed so long as it is done in the testator’s conscious presence and at his or her direction.

- Witnesses. Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s ac-nowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will “within a reasonable time.”

- Presence. The only presence requirement is for proxy signature.\textsuperscript{172}

- Publication. No publication or declaration by the testator is required.

- Holograph. Alaska permits holographic wills if the signature and material “portions” of the document are in the testator’s handwriting.\textsuperscript{173}

- Choice of Law. The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.\textsuperscript{174}

- Compliance. Alaska has not enacted a harmless error statute.

3. Arizona

Arizona’s statute is similar to Revised UPC § 2-502. Ariz. Rev. Stat. Ann. § 14-2302(A) provides that: a will shall be:

1. In writing.
2. Signed by the testator or in the testator’s name by some other individual in the testator’s conscious pres-ence and by the testator’s direction.
3. Signed by at least two people, each of whom signed within a reasonable time after that person witnessed either the signing of the will as described in paragraph 2 or the testator’s acknowledgment of that signature or acknowledgment of the will.

Set forth below is a quick examination of the specific Arizona will execution requirements:

- Testator’s Signature. The testator must sign the will, but it need not be at the end. Proxy signature is allowed so long as it is done in the testator’s conscious presence and at his or her direction.

- Witnesses. Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s ac-

\textsuperscript{166} In Pope v. Clerk, 551 So. 2d 1053 (Ala. 1989), the Alabama Supreme Court stated that a document was not a valid will because two of the three witnesses signed the will after the testator’s death.

\textsuperscript{167} Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute.

\textsuperscript{168} Ala. Code § 43-6-135 provides: A written will is valid if executed in compliance with (Ala. Code) section 43-6-131 (will execution statute) or if its execution complies with the law of the place of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, but a place of abode or is a national.

\textsuperscript{169} Although the statute does not require the witnesses to sign in the testa-tor’s presence, they must actually witness in order to comply with the statute.

\textsuperscript{170} Alaska Stat. § 13.12.502(b) provides that “[e]xcept as provided in [Alaska Stat. § 13.06.068], a will that does not comply with (a) of this section is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.”

\textsuperscript{171} Alaska Stat. § 13.12.506 provides that a will is valid if executed in compliance with Alaska Stat. § 13.12.502 if it is executed complies with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

\textsuperscript{172} Ariz. Rev. Stat. Ann. § 14-2302(A) states that: “(A) Except as otherwise provided in this section, a will is valid if executed in compliance with this section.”

\textsuperscript{173} Ariz. Rev. Stat. Ann. § 14-2302(A) states that: “A holographic will created under this section is valid if executed in compliance with this section.”

\textsuperscript{174} Ariz. Rev. Stat. Ann. § 14-2302(A) states that: “A holographic will created under this section is valid if executed in compliance with this section.”
knowledge of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will “within a reasonable time.”

- Presence. The only presence requirement is for proxy signatures.
- Publication. No publication or declaration by the testator is required.
- Holograph. Arizona permits holographic wills if the signature and material “previsions” of the document are in the testator’s handwriting.
- Choice of Law. The choice of law statute tracks UPC §2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.
- Compliance. Arizona has not enacted a harmless error statute.

4. Arkansas

The Arkansas will formalities statute is similar to the English Wills Act formalities.

Ark. Code Ann. § 28-25-103 provides:

(a) The execution of a will, other than holograph, must be by signature of the testator and of at least two (2) witnesses.

(b) The testator shall declare to the attesting witnesses that the instrument is his or her will and either:

(A) Himself or herself sign; or

(B) Acknowledge his or her signature already made:

(C) Sign by mark, his or her name being written near it and witnessed by a person who writes his or her own name.

- An Arkansas court of appeals held that Aziz v. Rev. Stat. Ann. § 14-2502 “does not preclude a witness from signing a testamentary document after the testator has died.” In In re Estate of Aziz, 150 S.W.3d 97, 98 (Ark. Ct. App. 2005). The court explained that the Arkansas statutes require Aziz v. Rev. Stat. Ann. § 14-2502 to be “in order to confirm Arkansas law with revisions made to the Uniform Probate Code in 1990.” Id. at 101. Therefore, the court looked to the comments following UPC §2-502 in analyzing Aziz v. Rev. Stat. Ann. § 14-2502. Id. at 101–102. Importantly, the comment to UPC §2-502(a)(3), the court noted, provides that “the reasonable time requirement could be satisfied even if the witnesses sign after the testator’s death” and there is “no requirement that the witnesses sign before the testator’s death.” Id.

- Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute.

- Aziz v. Rev. Stat. Ann. § 14-2502 states that a “will that does not comply with Aziz v. Rev. Stat. Ann. § 14-2502 is invalid as a holographic will, whether or not witnessed, if the signature and the material provisions are in handwriting of the testator.”

- An Arizona court of appeals held that a “witness to a holographic will must sign the will at the time of execution by the place where the will is executed, or of the law of the place where the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

176 An Arizona court of appeals held that Aziz v. Rev. Stat. Ann. § 14-2502 “does not preclude a witness from signing a testamentary document after the testator has died.” In In re Estate of Aziz, 150 S.W.3d 97, 98 (Ark. Ct. App. 2005). The court explained that the Arizona statutes require Aziz v. Rev. Stat. Ann. § 14-2502 to be “in order to confirm Arizona law with revisions made to the Uniform Probate Code in 1990.” Id. at 101. Therefore, the court looked to the comments following UPC §2-502 in analyzing Aziz v. Rev. Stat. Ann. § 14-2502. Id. at 101–102. Importantly, the comment to UPC §2-502(a)(3), the court noted, provides that “the reasonable time requirement could be satisfied even if the witnesses sign after the testator’s death” and there is “no requirement that the witnesses sign before the testator’s death.” Id.

177 Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute.

178 Aziz v. Rev. Stat. Ann. § 14-2502 states that a “will that does not comply with Aziz v. Rev. Stat. Ann. § 14-2502 is invalid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.”


A witness to a holographic will must sign the holographic will in compliance with Aziz v. Rev. Stat. Ann. § 14-2502 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

180 Smith v. Wharton, 78 S.W.3d 79, 87 (Ark. 2002) (quoting Patrick v. Ruskin, 506 S.W.2d 853, 854 (Ark. 1974)). The Arkansas Supreme Court explained that “the attending witnesses to the testator’s mark cannot act in the dual capacity of an attending witness to the will.” Id.

181 The Arkansas statute does not permit the witnesses to sit with the testator’s acknowledgment of the will. Ark. Code Ann. § 28-25-105(b).

182 If testamentary signs by mark the mark must be witnessed by a person who signs his or her name as a witness to the signature of at least two other witnesses.

183 An Arkansas appellate court analyzed the “test of the presence of the testator’s language” in Comer v. Donaldson, 145 S.W.3d 395 (Ark. Ct. App. 2004). The court explained that a “will is attested in the presence of the testator if the witnesses are within range of any of the testator’s senses.”

184 The Arizona statute does not require, however, that the witnesses sign in the presence of each other. See Upton v. Upton, 759 S.W.2d 811 (Ark. Ct. App. 1988).
handwriting of the testator, and if at least three credible disinterested witnesses testify to the handwriting and signature of the testator.1163

- Choice of Law. The choice of law statute will recognize as valid a will executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.1164

- Compliance. Arkansas has not enacted a harmless error statute.1165

5. California

Unlike UPC § 2-502, California has several formal requirements for a will to be valid.

Cal. Prob. Code § 6110 provides:

(a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed by one of the following:

(1) By the testator,

(2) In the testator’s name by some other person in the testator’s presence and by the testator’s direction.

(3) By a conservator pursuant to a court order to make a will under [Cal. Prob. Code] Section 2580.116

(c)(1) Except as provided in paragraph (2), the will shall be witnessed by being signed, during the testator’s lifetime, by at least two persons each of whom (A) being present at the same time, witnessed either the signing of the will or the testator’s acknowledgment of the signature or of the will and (B) understand that the instrument they sign is the testator’s will.

(2) If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will established by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.

Set forth below is a quick examination of the specific California will execution requirements:

- Testator’s Signature. The testator must sign the will but his or her signature does not have to be at the end. A proxy signature is allowed for the testator as long as it is done in his or her presence and at his or her direction. In addition, a court-appointed conservator may sign a will on behalf of the testator.

- Witnesses. Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of the signature; or (3) the testator’s acknowledgment of the will. The witnesses must sign the will. In addition, the witnesses must be cognizant that the document is the testator’s will.1160

- Presence. The presence requirements are: (1) the testator’s signature, acknowledgment of his or her signature, or acknowledgment of the will must be in the presence of at least two attesting witnesses; and (2) if the testator’s name is signed by someone else, that proxy signature must be in the testator’s presence and at his or her direction.1160

- Publication. Although publication by the testator is not required, the statute requires that the witnesses “understand that the instrument they sign is the testator’s will.”1160

- Holograph. A holograph is permitted in California if the signature and material “provisions” are in the testator’s handwriting.1162 If, however, the holograph does not include a date, and this omission results in doubt as to whether the holograph’s “provisions or the inconsistent provisions of another will are controlling, a presumption arises that the provisions of the holograph are invalid to the

1163 Ark. Code Ann. § 28-25-104 provides: When the entire body of the will and the signature shall be written in the proper handwriting of the testator, the will may be established by the evidence of at least three (3) credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to the will.

1164 Ark. Code Ann. § 28-25-105 provides:

A will executed outside this state in a manner prescribed by [Ark. Code Ann.] §§ 28-25-105-28-25-104 or a wills executed outside this state in a manner prescribed by the law of the place of execution or by the law of the testator’s domicile at the time of its execution shall have the same force and effect in this state as it executed in this state in compliance with the provisions of [Ark. Code Ann.] §§ 28-25-101-28-25-104.

1165 Arkansas does not have a statute similar to the UPC § 2-503 harmless error statute. Courts in Arkansas have, however, validated wills using the substantial compliance doctrine for certain formalities but not for all. See II, C, 6, above.

1166 Cal. Prob. Code § 2580(a) and (b)(13) provides that the conservator or other interested person may file a petition to obtain court authorization to make a will.

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extent of the inconsistency. The holograph statute expressly permits a statement of testamentary intent to be set forth in the holograph as part of a commercially printed form.

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.

- **Compliance.** California has enacted a harmless error statute.

6. Colorado

Colorado’s statute is patterned after Revised UPC § 2-502. Colo. Rev. Stat. § 15-11-502(1) provides:

(1) Except as otherwise provided in subsection (2) of this section and in [Colo. Rev. Stat.] sections 15-11-503 (harmless error), 15-11-506 (choice of law), and 15-11-513 (separate writing identifying tangible personal property), a will shall be:

(a) In writing;

(b) Signed by the testator, or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

(c) Either:

(I) Signed by at least two individuals either prior to or after the testator’s death, each of whom signed within a reasonable time after he or she witnessed either the testator’s signing of the will as described in paragraph (b) of this subsection (1) or the testator’s acknowledgment of the signature or acknowledgment of the will; or

(II) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.

199 Cal. Prob. Code § 6113 provides:

A written will is validly executed if its execution complies with any of the following:

(a) The will is executed in compliance with [Cal. Prob. Code] Section 6100 or 6111.

(b) The execution of the will complies with the law at the time of execution of the place where the will is executed.

(c) The execution of the will complies with the law of the place where the will is executed.

(d) The testator is domiciled, has a place of abode, or is a national.


(c)(1) Except as provided in paragraph (2), the will shall be witnessed by being signed, during the testator’s lifetime, by at least two persons each of whom:

(A) being present at the same time, witnessed either the signing of the will or the testator’s acknowledgment of the signature or of the will; and

(B) understand the instrument they sign is the testator’s will.

(2) If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponents of the will establish by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.

Set forth below is a quick examination of the specific Colorado will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s conscious presence and at the testator’s direction.

- **Witnesses.** Unless the notarial will option is used, two witnesses are required. Witnesses must witness either: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will, either before or after the testator’s death, within a reasonable time after witnessing the testator’s signing of the will. An unattested will can be valid if acknowledged by the testator before a notary.

- **Presence.** The only presence requirement is for proxy signature.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A holograph is permitted if the signature and material “portions” are in the testator’s handwriting.

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.

- **Compliance.** Colorado has enacted a harmless error statute.

7. Connecticut

Conn. Gen. Stat. § 45a-251 provides as follows:


200 Colo. Rev. Stat. § 15-11-502(2) states that "[f]or purposes of this section, 'conscious presence' requires physical proximity to the testator but not necessarily within testator’s line of sight.”

201 Colo. Rev. Stat. § 15-11-502(1) and (3) provides that:

(2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the signatures and material portions of the document are in the testator’s handwriting.

202 The statute provides:

(3) that the document constitute the testator’s will can be established by evidence including, for holographic wills, portions of the document that are not in the testator’s handwriting.

203 Colo. Rev. Stat. § 15-11-506 provides:

A written will is valid if executed in compliance with [Colo. Rev. Stat.] section 15-11-502 or 15-11-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national.

204 Colorado has adopted the UPC’s harmless error provision. Colo. Rev. Stat. § 15-11-503, entitled “Writings involved as wills," provides that:

(1) Although a document, or writing added upon a document, was not executed in compliance with [Colo. Rev. Stat.] section 15-11-502, the document or writing is treated as if it had been executed in compliance with that section if the proponents of the document or writing establishes by clear and convincing evi-
Making and execution of wills. Wills executed outside the state. A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator’s presence; but any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state.

Set forth below is a quick examination of the specific Connecticut will execution requirements:

- **Testator’s Signature.** The testator’s signature must be at the end.390
  - **Witnesses.** Two witnesses are required. Witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature.207 In addition, the witnesses must subscribe their names to the will.
  - **Presence.** The witnesses must sign in the testator’s presence.
  - **Publication.** No publication or declaration by the testator is required.
  - **Holograph.** Holographic wills are not permitted.
  - **Choice of Law.** The choice of law statute recognizes as valid a will executed with the formalities required at the time of will execution by the jurisdiction where the will was executed.202
  - **Compliance.** Connecticut has not enacted a harmless error statute.203

8. Delaware

Del. Code Ann. tit. 12, § 202 provides as follows: Requisites and execution of will.

(a) Every will, whether of personal or real estate, must be:

- (1) In writing and signed by the testator or by some person subscribing the testator’s name in the testator’s presence and by the testator’s express direction; and
- (2) Subject to [Del Code Ann. tit. 12] § 1306 [choice of law], attested and subscribed in testator’s presence by 2 or more credible witnesses.

(b) Any will not complying with subsection (a) of this section shall be void.

Set forth below is a quick examination of the specific Delaware will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is subscribed in the testator’s presence and at his or her direction.
  - **Witnesses.** Two witnesses are required. The witnesses must witness either: (1) the testator’s signature; or (2) the testator’s acknowledgment of the will.208 In addition, the witnesses must subscribe their names to the will.
  - **Presence.** The presence requirements are: (1) the testator’s signature must be in the presence of at least two attesting witnesses; (2) the attesting witnesses must subscribe their names in the presence of the testator; and, (3) if the testator’s name is signed by someone else, the proxy signature must be subscribed in the testator’s presence and direction.
  - **Publication.** No publication or declaration by the testator is required.
  - **Holograph.** Holographic wills are not permitted.205
  - **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.206
  - **Compliance.** Delaware has not enacted a harmless error statute.

9. District of Columbia

The District of Columbia is not a UPC state. Its formalities generally follow the English Statute of Frauds.

D.C. Code Ann. § 18-103 provides:

390 The requirement that the will must be “subscribed by the testator” means that the will must be signed at the end by the testator. Werter v. Werter, 244 A.2d 359, 361 (Conn. 1968).

389 Conn. Gen. Stat. § 45a-251 provides (in part) Any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state.

A will or testament, other than a will executed in the manner provided by [D.C. Code Ann.] section 18-107 (nuncupative wills), is void unless it is:

1. (in writing and signed by the testator, or by another person in his presence and by his express direction; and
2. (attested and subscribed in the presence of the testator, by at least two credible witnesses.

Set forth below is a quick examination of the specific District of Columbia will execution requirements:

- **Testator’s Signature.** The testator must sign the will but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must attest to witnessing either: (1) the testator’s signature; or (2) the testator’s acknowledgment of the will. In addition, the witnesses must subscribe their names to the will.

- **Presence.** The presence requirements are: (1) the testator’s signature must be in the presence of at least two attesting witnesses; (2) the attesting witnesses must subscribe in the presence of the testator; and, (3) if the testator’s name is signed by someone else, the proxy signature must be signed in the testator’s presence and direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The District of Columbia appears to follow the common law rule regarding choice of law.

- **Compliance.** The District of Columbia has not enacted a harmless error statute.

10. **Florida**

Florida’s statute, while originally patterned after the more liberal English Statute of Frauds, now contains formalities that resemble the English Wills Act.

Fla. Stat. § 732.502(1) provides that:

Every will must be in writing and executed as follows:

1. The testator’s signature. —
   1. The testator must sign the will at the end; or
   2. The testator’s name must be subscribed at the end of the will by some other person in the testator’s presence and by the testator’s direction.

2. **Witnesses.** — The testator’s:\n   1. Signing, or
   2. Acknowledgment: a. That he or she has previously signed the will, or

b. That another person has subscribed the testator’s name to it, must be in the presence of at least two attesting witnesses.

- **Witnesses’ Signatures.** — The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.

Set forth below is a quick examination of the Florida will execution requirements:

- **Testator’s Signature.** The testator must sign the will at the end. The testator’s name may be signed by proxy as long as it is done in the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must attest to witnessing: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature.

- **Presence.** The presence requirements are: (1) the testator’s signature or acknowledgment of his or her signature must be in the presence of at least two attesting witnesses; (2) the attesting witnesses must sign in the presence of the testator; (3) the attesting witnesses must sign in the presence of each other; and, (4) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute recognizes as valid a will executed with the formalities required at the time of will execution by the jurisdiction where the will was executed. However, Florida does not accept holographic wills even if the state of execution accepts holographic wills.

- **Compliance.** Florida has not enacted a harmless error statute.

11. **Georgia**

Georgia’s statute is patterned after the English Statute of Frauds.

Ga. Code Ann. § 53-4-20 provides that:

(a) A will shall be in writing and shall be signed by the testator or by some other individual in the testator’s presence and at the testator’s express direction. A testator may sign by mark or by any name that is intended to authenticate the instrument as the testator’s will.

(b) A will shall be attested and subscribed in the presence of the testator by two or more competent witnesses. A witness to a will may attest by mark.

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206 In addition, Fla. Stat. § 732.502(1) provides: "Any will executed as a military testamentary instrument in accordance with 10 U.S.C. § 1044(c) Chap- ter 53, by a person eligible for military legal assistance is valid as a will in this state."
Another individual may not subscribe the name of a witness, even in that witness’s presence and at that witness’s direction. (c) A codicil shall be executed by the testator and attested and subscribed by witnesses with the same formality as a will.

Set forth below is a quick examination of the Georgia will execution requirements:

- **Testator’s Signature.** The testator must sign the will but it need not be at the end. The statute specifically allows the testator to sign by mark. In addition, the testator’s name may be signed by proxy as long as it in the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The testator must witness either: (1) the testator’s signature, his or her signature by proxy, or the testator’s mark; or (2) the testator’s acknowledgment of his or her signature.211 In addition, the witnesses must subscribe the will. The statute specifically allows a witness to sign by mark. A witness may not, however, sign by proxy.

- **Presence.** The presence requirements are: (1) the attesting witnesses must subscribe in presence of the testator; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** Pursuant to Georgia’s choice of law statute, an out-of-state will of a testator who died domiciled in Georgia is valid if it complies with Georgia law.212

- **Compliance.** Georgia has not enacted a harmless error statute.

12. Hawaii

Hawaii has adopted the Revised UCP provision for will execution.

Haw. Rev. Stat. § 560-2-502(a) provides (in part): (1) a will must be: (1) In writing; (2) Signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

211 See Miles v. Bryant, 389 S.E.2d 86, 87 (Ga. 2003). ("The maker may either sign the will in each witness’s presence or acknowledge her signature to the witnesses.").

212 Haw. Rev. Ann. § 53-3-51 provides:

A foreign will or an out-of-state will may be admitted to original common or solemn form probate under the rules governing probate of wills of testators who die domiciled in this state upon proof that the will is valid under the laws of this state and that it has not been offered for probate or establishment in the domiciliary jurisdiction or that it has been offered for probate but either no timely contest or similar objection was filed in the domiciliary jurisdiction or the grounds of a pending contest or similar objection are not such as would, if proved, cause the denial of probate.
Detailed Analysis

Except as provided for holographic wills, writings within section 15-2-506 (separate writing identifying tangible personal property) of this part, and wills within section 15-2-506 [choice of law] of this part, or except as provided in sections 51-109, 55-712A or 55-712B, Idaho Code, every will shall be in writing signed by the testator or in the testator’s name by some other person in the testator’s presence and by his direction, and shall be signed by at least two (2) persons each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will.

Set forth below is a quick examination of the specific Idaho will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. Proxy signature is allowed as long as it is done in the testator’s presence and at his or her direction.
- **Witnesses.** Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will.
- **Presence.** The only presence requirement needed is for proxy signature.
- **Publication.** No publication or declaration by the testator is required.
- **Holograph.** A holograph is permitted if the signature and the material “provisions” are in the testator’s handwriting.
- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.
- **Compliance.** Idaho has not enacted a harmless error statute.


Illinois’ statute is patterned after the English Statute of Frauds.

755 ILLCS 5-1-3(a) provides that “every will shall be in writing, signed by the testator or by some person in his presence and by his direction and attested in the presence of the testator by 2 or more credible witnesses.”

Set forth below is a quick examination of the Illinois will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is in the testator’s presence and by his or her direction.
- **Witnesses.** Two witnesses are required. The witnesses must attest to witnessing the testator’s signature or acknowledgment of his or her signature. In addition, the witnesses must sign the will.
- **Presence.** The presence requirements are: (1) the attesting witnesses must sign in the presence of the testator; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and direction.
- **Publication.** No publication or declaration by the testator is required.
- **Holograph.** Holographic wills are not permitted.
- **Choice of Law.** The choice of law statute will recognize as valid a will executed with the formalities required: (1) at the time of will execution in the jurisdiction where the will was executed; (2) at the time of execution in the jurisdiction of the testator’s domicile; or (3) at the time of execution if executed in accordance with the laws of Illinois.
- **Compliance.** Illinois has not enacted a harmless error statute.

15. Indiana

Ind. Code Ann. § 29-1-5-3(a) (in part) and (b) provides:

(a) A will, other than a nuncupative will, must be executed by the signature of the testator and of at least two (2) witnesses:

- **755 ILLCS 5-1-3(b) provides that a “will that qualifies as an international will under the Uniform International Wills Act is considered to meet all the requirements of subsection (a).”**

- **Note in Re Estate of Nicola, 696 N.E.2d 431 (Ill. Ct. App. 1998). In Nicola, the court explained that in order for a will to be admitted to probate, a witness must testify or sign affidavit stating “that they were present when the testator signed the will or acknowledged his signature upon the will.” Id. at 433 (citing 755 ILLCS 5-6-4).**

- **Illinois courts interpret the statute’s requirement that witnesses “attest” to mean that “they must sign their names thereto as witnesses. In addition to perceiving the acts necessary to the legal execution of the will.” In re Estate of Lums, 699 N.E.2d 1089, 1091 (Ill. App. Ct. 1998) (quoting 2 Boyce & Parker, Pope on the Law of Wills, § 19.74 at 173 (1900)).**

- **755 ILLCS 5-7-1, 5-6. 755 ILLCS 5-7-1 provides:**

A will signed by the testator when proved as provided in this Article may be admitted to prove in this State when either (a) the will has been admitted to prove outside of this State or (b) the will was executed out of this State in accordance with the laws of this State of the place where executed or of the testator’s domicile at the time of its execution.

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(1) it will under subsection (b);\textsuperscript{222} (b) A will may be attested as follows: (1) the testator, in the presence of two (2) or more attesting witnesses, shall signify his the witnesses that the instrument is the testator’s will and either: (A) sign the will; (B) acknowledge the testator’s signature already made; or (C) at the testator’s direction and in the testator’s presence have someone else sign the testator’s name. (2) The attesting witnesses must sign in the presence of the testator and each other. An attestation or self-proving clause is not required under this subsection for a valid will.

Set forth below is a quick examination of the specific Indiana will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. Proxy signature is allowed as long as it is done at the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness either: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature. In addition, the witnesses must sign the will.

- **Presence.** The presence requirements are: (1) the testator’s signature or acknowledgment thereof must be in the presence of the witnesses; (2) the attesting witnesses must sign in the presence of the testator; (3) the attesting witnesses must sign in the presence of each other; and, (4) if the testator’s name is signed by someone else, the proxy signature must be in the presence of the testator and by his or her direction.

- **Publication.** The testator must signify to the witnesses that the instrument is his or her will.\textsuperscript{223} (a) **Holograph.** Holographic wills are not permitted.

\textit{Choice of Law.} Indiana would recognize as valid a will executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile; (3) at the time of execution if executed in accordance with the laws of Indiana; or (4) at the time of death by the jurisdiction of the testator’s domicile.\textsuperscript{224}

- **Compliance.** Indiana has not adopted a harmless error statute.

\textsuperscript{222} Ibid. Code Ann. § 29-1-5-3(a)(2)-(3) deals with self-proving clauses and provides "(2) a self-proving clause under section 3.1(d) of this chapter; or (3) a self-proving clause under 3.1(d) of this chapter."

\textsuperscript{223} A will is sufficiently published where the testator signed it to be his will by the act of signing it after it had been referred to as his will, fulfilling the purpose of the statute by making the witnesses assure that the testator knew she was signing her will. Outlaw v. Dumez, 832 N.E.2d 1108, 1111 (Ind. Ct. App. 2005).

\textsuperscript{224} Ibid. Code Ann. § 29-1-5-5 provides:

\begin{quote}
16. Iowa

Iowa Code Ann. § 633.279(1) provides (in part): All wills and codicils ... to be valid, must be in writing, signed by the testator, or by some person in the testator’s presence and by the testator’s express direction writing the testator’s name therein, and declared by the testator to be the testator’s will, and witnessed, at the testator’s request, by two competent persons who signed as witnesses in the presence of the testator and in the presence of each other.\textsuperscript{225}

Set forth below is a quick examination of the specific Iowa will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. Proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgement of the signature.\textsuperscript{226} In addition, the witnesses must sign the will at the testator’s request.

- **Presence.** The presence requirements are: (1) the testator’s signature must be in the presence of two attesting witnesses; (2) the attesting witnesses must sign in the presence of the testator; (3) the attesting witnesses must sign in the presence of each other; and, (4) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and by his or her direction.

- **Publication.** The testator must declare the document to be his or her will.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute will recognize as valid a written will, subscribed by the testator, executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.\textsuperscript{227}

- **Compliance.** Iowa has not enacted a harmless error statute.

A will is legally executed if the manner of its execution complies with the law, in force either at the time of execution or at the time of the testator’s death, of (1) this state, or, (2) the place of execution, or (3) the domicile of the testator at the time of execution or at the time of his death.\textsuperscript{228}

\textsuperscript{225} In 2013, the state legislature amended Iowa Code Ann. § 633.279(2)(c), the provision relating to the execution of a self-proving will. See S.B. 2205, 84th Gen. Assemb., 2nd Reg. Sess. (Iowa 2013).\textsuperscript{226} In re Estate of Parker, 323 N.W.2d 921, 925 (Iowa 1982) (holding “the statute contemplates the will must be signed by the testator as the presence of the subscribing witnesses or he must adopt or acknowledge his signature to them”).

\textsuperscript{227} Iowa Code Ann. § 633.283 provides:

A will executed outside this state, in the mode prescribed by the law, either of the place where executed or of the testator’s domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said will is in writing and subscribed by the testator.
Detailed Analysis

17. Kansas


- Every will, except an oral will as provided in [Kan. Stat. Ann. §] 59-608 (nuncupative will) and amendments thereto, shall be in writing, and signed at the end by the party making the will, or by some other person in the presence and by the express direction of the testator. Such will shall be attested and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe or heard the testator acknowledge the will. 224

Set forth below is a quick examination of the specific Kansas will execution requirements:

- **Testator’s Signature.** The testator must sign at the end. A proxy signature is permitted so long as it is done in the testator’s presence and by his or her direction.
- **Witnesses.** Two witnesses are required. The witness must witness either: (1) the testator’s signature; or (2) the testator’s acknowledgment of the will. In addition, the witnesses must subscribe their names to the will.
- **Presence.** The presence requirements are: (1) the testator’s signature or acknowledgment must be in the presence of at least two witnesses; (2) the witnesses must sign in the testator’s presence; and, (3) if the testator’s name is signed by someone else, the proxy signature must be in the presence of the testator and by his or her direction.
- **Publication.** No publication or declaration by the testator is required.
- **Holograph.** Holographic wills are not permitted.
- **Choice of Law.** The choice of law statute would recognize as valid a written will, subscribed by the testator, if executed with the formalities required: (1) at the time of will execution either of Kansas or by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s residence; or (3) at the time of death by the jurisdiction of the testator’s residence. 225

However, Kansas does not accept a will even if valid in another jurisdiction unless the will is in writing and subscribed by the testator.

18. Kentucky


- No will is valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction. If the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two (2) credible witnesses, who shall subscribe the will with their names in the presence of the testator, and in the presence of each other.

Further, Ky. Rev. Stat. Ann. § 446.060(1) requires all writings to be signed at the end: “When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing.”

Set forth below is a quick examination of the specific Kentucky will execution requirements:

- **Testator’s Signature.** The testator must sign at the end. 226 A proxy signature is permitted so long as it is done in the testator’s presence and by his or her direction.
- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of the will. In addition, the witnesses must subscribe their names to the will.
- **Presence.** The presence requirements are: (1) the testator must sign or acknowledge the will in the presence of two attesting witnesses; (2) the attesting witnesses must sign in the testator’s presence; (3) the attesting witnesses must sign in the presence of each other; and, (4) if the testator’s name is signed by someone else, the person must sign in the presence of the testator and by his or her direction.
- **Publication.** No publication or declaration by the testator is required.
- **Holograph.** Holographic wills are permitted. 227 A holograph must be subscribed by the testator at the end of the instrument and wholly written by the testator.

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An oral will made in the last sickness shall be valid in respect to personal property, if reduced to writing and subscribed by two competent, disinterested witnesses within thirty days after the speaking of the testamentary words, when the testator called upon some person present at the time the testamentary words were spoken to bear testimony to said disposition as his or her will.


A will executed without this statute is the manner prescribed by this act, by the law of the place of its execution, or by the law of the testator’s residence, either at the time of its execution or of the testator’s death, shall be deemed to be legally executed, and shall have the same force and effect as executed in compliance with the provisions of this act: Provided, Said will is in writing and subscribed by the testator.

226 Ky. Rev. Stat. Ann. § 394.040 allows for holographic wills if they are wholly handwritten by the testator. In defining “wholly written,” some states have construed the term to mean a will is not valid if there is any other writing on the instrument, such as the testator writing his or her will on the letterhead of a business, or the testator using a will form and merely filling in the blanks. Kentucky has split this difference in the middle. In order to admit a will to probate, material that is not handwritten by the testator in a holographic will may be excised from the will, while the remainder of the instrument will be admitted to probate if the remaining provisions make sense by themselves. For example, under Kentucky law, a will entirely handwritten on the letterhead of a business would probably be accepted as a holographic will, whereas a will created by filling in the blanks on a form would not be valid. Ky. Rev. Stat. Ann.

227 A will is not signed at the end when the signature is followed by a disposable clause which adds to or modifies previous bequests, but if the clause below the signature does not affect the disposition of the estate, it is usually held not to invalidate the instrument: "Lucas v. Brown, 219 S.W. 796, 798 (Ky. Ct. App. 1920)."
proxy signature is permitted when the testator cannot make his or her own mark because of some physical infirmity, so long as the testator has declared or signified that the document is his or her testament and the proxy signature is made at his or her direction.\textsuperscript{212}

\textbullet\ \textbf{Witnesses.} Two witnesses and a notary are required, and all must sign a declaration stating that: “In our presence, the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this day of...” or something substantially similar.\textsuperscript{216}

\textbullet\ \textbf{Presence.} Louisiana requires not only the presence of two witnesses and the notary; (2) the attesting witnesses and the notary must sign in the presence of the testator; (3) the attesting witnesses and the notary must sign in the presence of each other; and, (4) if the testator’s signature or mark is made with the assistance of another or by proxy, it must be done at the testator’s direction and in the presence of the notary.\textsuperscript{218}

\textbullet\ \textbf{Publication.} The testator must, in the presence of the notary and two witnesses, declare or otherwise indicate that the document is his or her testament.\textsuperscript{225}

\textbullet\ \textbf{Holographic.} Holographic (often referred to as olographic in Louisiana) wills are permitted. A holograph must be entirely written, dated, and signed in the handwriting of the testator.\textsuperscript{229}

\textsuperscript{229} Where the testator does not know how to sign his or her name, or cannot do so because of some physical limitation, he or she must declare or signify his or her limitation, and must affix his or her mark “or otherwise cause [it] to be affixed, where his signature would otherwise be required...” If the testator cannot affix his or her mark, he or she may direct another to help him or her affix it or to sign his or her name. La. Civ. Code Ann. art. 1579–1580.

\textsuperscript{218} La. Civ. Code Ann. art. 1577. Where the testator is literate and sighted but physically unable to sign, the following declaration should be signed: “In our presence the testator has declared or signified that this is his testament, and that he is able to see and read and knows how to sign his name but is unable to do so because of physical infirmity, and in our presence he has affixed, or caused to be affixed, his mark or name at the end of the testament and on each separate page, and in the presence of the testator and each other, we have subscribed our names this day of...” or something substantially similar. La. Civ. Code Ann. art. 1578. Additionally, where the testator is unable to read, the declaration by the witnesses and notary should be as follows: “This testament has been read aloud in our presence and in the presence of the testator, each having been followed on copies of the testament by the witnesses (and the notary if he is not the person who reads it aloud), and in our presence the testator declared or signified that he read the reading, and that the instrument is his testament, and that he signed his name at the end of the testament and on each other separate page; and in the presence of the testator and each other, we have subscribed our names this day of...” or something substantially similar. La. Civ. Code Ann. art. 1579. Finally, where the notarial testament has been drafted in braille, the declaration in the notarial testament must be in writing, not braille. La. Civ. Code Ann. art. 1580.


\textsuperscript{216} Id.

\textsuperscript{218} Id.

\textsuperscript{225} In 2001, in an effort to legislatively overturn Succession of King, 595 So. 2d 806 (La. App. 2 Cir. 1992), the Louisiana Legislature amended La. Civ. Code Ann. art. 1578.
**Choice of Law.** Patterned after the "Uniform Wills Act, Foreign Executed, of 1910," Louisiana's choice of law statute states:241

A will executed outside this state in the manner prescribed by the law of the place of its execution or by the law of the testator's domicile, at the time of its execution shall be deemed to be legally executed and shall have the same force and effect in this state as if executed in the manner prescribed by the laws of this state, provided the will is in writing and subscribed by the testator.

**Compliance.** Louisiana has not enacted a harmless error statute.

20. **Maine**

Maine's execution statute is patterned after the Original UPC.


[Except for holographic wills and wills executed under the laws of another jurisdiction] every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will.

Set forth below is a quick examination of the specific Maine execution requirements:

**Testator's Signature.** The testator must sign the will, but it need not be at the end. Proxy signature is permitted so long as it is done in the testator's presence and at his or her direction.

**Witnesses.** Two witnesses are required. The witnesses must witness (1) the testator's signature; (2) the testator's acknowledgment of his or her signature; or (3) the testator's acknowledgment of his or her will. In addition, the witnesses must sign the will.

Code Ann. art. 1575 to read as follows:

A. An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. Although the date may appear anywhere in the testament, the testator must sign the testament at the end of the testament. If anything is written by the testator after his signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament. The olographic testament is subject to no other requirement as to form. The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament or, as clarified by statutory evidence if necessary.

B. Additions and deletions on the testament may be given effect only if made by the hand of the testator.


A will executed outside this state in the manner prescribed by the laws of the place of its execution or by the law of the testator’s domicile, at the time of its execution shall be deemed to be legally executed and shall have the same force and effect in this state as if executed in the manner prescribed by the laws of this state, provided the will is in writing and subscribed by the testator.

**Presence.** The only presence requirement needed is for proxy signature.242

**Publication.** No publication or declaration by the testator is required.

**Holograph.** A holograph is permitted if the signature and the material provisions are in the handwriting of the testator.243

**Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator's domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.244

**Compliance.** Maine has not enacted a harmless error statute.

21. **Maryland**

Maryland's Probate Code is patterned after the Statute of Frauds.

Md. Code Ann., Est. & Trusts § 4-102 states that:

Except as provided in §§ 4-103 [holographic wills] and 4-104 [choice of law] of this subtitle, every will shall be (1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) attested and signed by two or more credible witnesses in the presence of the testator.

Set forth below is a quick examination of the specific Maryland will execution requirements:

**Testator’s Signature.** The testator must sign the will, but it does not have to be at the end. A proxy signature is permitted, so long as it is done at the testator's direction and is made in his or her presence.

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241 Although the statute does not require the witnesses to sign in the testator's presence, they must actually witness in order to comply with the statute.


243 Referring to the comments following Revised UPC § 2-503, the Supreme Court of Maine explained that the statute's requiring only the "material provisions" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will.

244 Tex. Est. Code Ann. § 4-102 provides:

A will is valid if executed in compliance with the Statute of Frauds. Section 2-502 is valid if the will's material provisions are in the testator's handwriting, and the will's material provisions are in the testator's handwriting, or if such execution complies with the law at the time of execution of the place where the will is executed, or of the place of the place where the will is executed, or at the time of death the testator is domiciled, has a place of abode or is a national.

Furthermore, a will is valid if its execution is in compliance with 10 USC § 1044a for military testamentary instruments.
• Witnesses. Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature.\(^\text{246}\) In addition, the witnesses must sign the will.\(^\text{247}\)

• Presence. The presence requirements are: (1) the attesting witnesses must sign in the testator’s presence; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and at the testator’s direction.

• Publication. No publication or declaration by the testator is required.

• Holograph. Holographic wills are only permitted for members of the armed forces and become void one year after discharge.\(^\text{248}\)

• Choice of Law. The choice of law statute will recognize as valid a written will, signed by the testator, executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.\(^\text{249}\)

• Compliance. Maryland has not enacted a harmless error statute.

22. Massachusetts

Mass. Gen. Laws ch. 190B, § 2-502 states that:

(a) Except as provided in subsection (b) and in sections 2-506 [choice of law] and 2-513 [separate writing identifying tangible personal property], a will shall be:

(1) in writing;

(2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

(3) signed by at least 2 individuals, each of whom witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgment of the will.

Set forth below is a quick examination of the specific Massachusetts will execution requirements:

• Testator’s Signature. The testator must sign the will, but it need not be at the end. A proxy signature is allowed so long as it is done at the testator’s direction and in his or her conscious presence.

• Witnesses. Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of his or her will. In addition, the witnesses must sign the will.

• Presence. The only presence requirement is for proxy signature.\(^\text{250}\)

• Publication. No publication or declaration by the testator is required.

• Holograph. Holographic wills are permitted if the signature and the material provisions are in the handwriting of the testator.\(^\text{251}\)

• Choice of Law. The choice of law statute tracks UCP § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.\(^\text{252}\)

• Compliance. Massachusetts has not enacted a harmless error statute.

23. Michigan

Mich. Comp. Laws § 700.2502(1) provides that:

(1) Except as provided in subsection (2) and in [Mich. Comp. Laws] sections 2503 [harmless error], 2506 [choice of law], and 2513 [separate writing identifying tangible personal property], a will is valid only if it is all of the following:

(a) in writing.

(b) Signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction.

\(^{246}\) In Stuck v. Trust, 791 A.2d 129 (Md. 2002), Maryland’s highest court discussed the meaning of the term “attested” found in Md. Code Ann., Est. & Trusts § 4-102(2). The court defined “attestation of a will as ‘the act of witnesses in seeing that those things exist and are done which the statute requires.’” 791 A.2d at 135 (quoting St. Mary’s v. San Marco, 39 A.2d 752, 755 (Md. 1944)). The court held that if the testator does not sign in the presence of the witnesses, “the testator must acknowledge his signature,” which “can be accomplished by conduct alone.” Id. at 136.

\(^{247}\) Md. Code Ann., Est. & Trusts § 4-103 provides:

(a) A will is executible in the handwriting of a testator who is serving in the armed services of the United States is a valid holographic will if signed by the testator outside of a state of the United States, the District of Columbia, or a territory of the United States even if there are no attesting witnesses.

(b) A holographic will is void one year after the discharge of the testator from the armed services unless the testator has died prior to expiration of the year or does not then possess testamentary capacity.

\(^{248}\) Md. Code Ann., Est. & Trusts § 4-104 provides:

A will executed outside this State is properly executed if it is:

(1) in writing;

(2) signed by the testator; and

(3) Executed in conformity with the provisions of [Md. Code Ann., Est. & Trusts] § 4-102, or the law of the domicile of the testator, or the place where the will is executed.

\(^{249}\) Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute. Mass. Gen. Laws ch. 190B, § 2-502(c)(2).


\(^{251}\) Mass. Gen. Laws ch. 190B § 2-506 provides:

A written will is valid if executed in compliance with section 2-502 (will executionstatute) or its execution complies with the law at the time of execution of the place where the will is executed, or if the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.
Detailed Analysis

(c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator’s acknowledgment of that signature or acknowledgment of the will. 

Set forth below is a quick examination of the specific Michigan will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not have to be at the end. A proxy signature is permitted, so long as it is done in the testator’s conscious presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of his or her will. In addition, the witnesses must sign the will.

- **Presence.** The only presence requirement is for proxy signature.253

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A will that does not comply with Mich. Comp. Laws § 700.2502(1) “is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator’s signature and the document’s material portions are in the handwriting of the testator.”

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.254

- **Compliance.** Michigan has enacted a harmless error statute.254

24. **Minnesota**

Minnesota RSC adopted § 2-502 of the Revised UPC. Minn. Stat. Ann. § 524.2-502 states that:

253 Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute. Mich. Comp. Laws § 700.2502(1).

254 Mich. Comp. Laws § 700.2506 provides: A written will is valid if reenacted in compliance with [Mich. Comp. Laws] section 2502 or 2503, with the law at the time of execution of the place where the will is executed, or with the law of the place where, at the time of execution or at the time of death, the testator is domiciled, as a place of abode, or is a national.

255 The Michigan harmless error statute, Mich. Comp. Laws § 700.2503, provides as follows: Although a document or writing added upon a document was not executed in compliance with [the execution requirements provision], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the document intended the document or writing to constitute any of the following:

(a) The decedent’s will.

(b) A partial or complete revocation of the will.

(c) An addition to or an alteration of the will.

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A will must be:

1. In writing;

2. Signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction or signed by the testator’s conservator pursuant to a court order under [Minn. Stat. Ann.] section 524.5-411;257 and

3. Signed by at least two individuals, each of whom signed within a reasonable time after witnessing either the signing of the will as described in clause (2) or the testator’s acknowledgment of that signature or acknowledgment of the will.

Set forth below is a quick examination of the specific Minnesota will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not have to be at the end. A proxy signature is permitted, so long as it is done in the testator’s conscious presence and at his or her direction. Furthermore, after giving notice to affected individuals and after a court hearing, a conservator may “make, amend, or revoke” the testator’s will pursuant to the express authorization of the court.256 Unlike a proxy signature, there is no requirement that the conservator sign in the testator’s presence or at the testator’s direction.

- **Witnesses.** Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her will; or (3) the testator’s acknowledgment of his or her will. In addition, the witnesses must sign the will “within a reasonable time.”257

- **Presence.** The only presence requirement is for a proxy signature.258

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdic-
tion of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.259

- Compliance. Minnesota has not enacted a harmless error statute.

25. Mississippi

Mississippi has patterned its execution requirements after the Statute of Frauds.

Miss. Code Ann. § 91-5-1 provides (in part) that a will or codicil must be:

- signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction. Moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two (2) or more credible witnesses in the presence of the testator or testatrix.

Set forth below is a quick examination of the specific Mississippi will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not have to be at the end. A proxy signature is permitted, so long as it is done in the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. Witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of the signature. In addition, the witnesses must sign the will.

- **Presence.** The presence requirements are: (1) the attesting witnesses must attest in the presence of the testator; and, (2) if the testator’s signature is made by proxy, it must be done in the testator’s presence and at his or her direction.

- **Publication.** The attesting witnesses must know the purpose of their attestation.267

- **Holograph.** Holographs are permitted. A holograph must be "wholly written" and subscribed by the testator.268

- **Choice of Law.** Mississippi appears to follow the common law rule regarding choice of law.

- **Compliance.** Mississippi has not enacted a harmless error statute.

26. Missouri

Missouri has patterned its execution requirements after the Statute of Frauds.

Mo. Ann. Stat. § 474.320 provides that:

Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.

Set forth below is a quick examination of the specific Missouri will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not have to be at the end. A proxy signature is permitted, so long as it is done in the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgement of the will.263 In addition, the witnesses must subscribe their names to the will.

- **Presence.** The presence requirements are: (1) the attesting witness must subscribe their names in the testator’s presence; and, (2) if the testator’s name is signed by someone else, the proxy signature must be made in the testator’s presence and at his or her direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.266

- **Compliance.** Missouri has not enacted a harmless error statute.

27. Montana

Mont. Code Ann. § 72-2-522 provides:

- (1) Except as provided in [Mont. Code Ann. §§] 72-2-522 [harmless error], 72-2-526 [choice of law].

529 In re Estate of McELLROY, 141 S.W.2d 810, 816 (Mo. 1940), the court held that "[a]lthough attesting clauses frequently recite that the will was signed by the testator in the presence of the witnesses and that the witnesses signed in the presence of each other, etc., there is nothing in the statute that so requires, and such is not necessary." Although the testator had signed before one of the witnesses entered the room, it was enough that the testator referred to the document as her will.

526 In re Estate of McELLROY, 141 S.W.2d 810, 816 (Mo. 1940), the court held that "[a]lthough attesting clauses frequently recite that the will was signed by the testator in the presence of the witnesses and that the witnesses signed in the presence of each other, etc., there is nothing in the statute that so requires, and such is not necessary." Although the testator had signed before one of the witnesses entered the room, it was enough that the testator referred to the document as her will.

525 Minn. Stat. Ann. § 524.2-506 provides:

A written will is valid if executed in compliance with [Minn. Stat. Ann. § 524.2-502] or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

526 In In re Estate of McELLROY, the Supreme Court of Mississippi reasoned that the statutory condition of attestation requires more than just the witnesses’ signatures. The court found that “Mississippi Code Section 91-5-1 requires that attesting witnesses to a will know the purpose of their attestation.” 390 So. 2d 1273, 1276 (Miss. 1980).

527 In In re Estate of McELLROY, the Supreme Court of Mississippi reasoned that the statutory condition of attestation requires more than just the witnesses’ signatures. The court found that “Mississippi Code Section 91-5-1 requires that attesting witnesses to a will know the purpose of their attestation.” 390 So. 2d 1273, 1276 (Miss. 2010). The Supreme Court of Mississippi noted that either formal or constructive publication would ensure that the witnesses had knowledge of the purpose of their attestation. Id.

528 Miss. Code Ann. § 91-5-1.
law], 72-2-533 [separate writing identifying tangible personal property], and subsection (2) of this section, a will must be:

(a) in writing;
(b) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and
(c) signed by at least two individuals, each of whom signed within a reasonable time after having witnessed either the signing of the will as described in subsection (1)(b) or the testator’s acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

(3) Intent that the document constitute the testator’s will may be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator’s handwriting.

Set forth below is a quick examination of the specific Montana will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed for the testator, as long as it is done in the testator’s conscious presence and at his or her direction.

- **Witnesses.** Two witnesses are required. Witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will within a reasonable time.

- **Presence.** The only presence requirement is for a proxy signature.259

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A holograph is permitted if the signature and material “portions” are in the testator’s handwriting.260

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.

### Nebraska

- **Compliance.** Montana has enacted a harmless error statute.258

28. **Nebraska**

Neb. Rev. Stat. § 30-2327 provides:

Except as provided for holographic wills, writings within [Neb. Rev. Stat.] section 30-2338 [separate writing identifying tangible personal property], and wills within [Neb. Rev. Stat.] section 30-2331 [choice of law], every will is required to be in writing signed by the testator or in the testator’s name by some other individual in the testator’s presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will.

Set forth below is a quick examination of the specific Nebraska execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is permitted so long as it is done in the testator’s presence and at his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of his or her will. In addition, the witnesses must sign the will.

- **Presence.** The only presence requirement is for a proxy signature.260

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A holograph is permitted if the signature and the material provisions are in the handwriting of the testator, and some indication of the date is provided.270

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that

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259 Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness the act in order to comply with the statute. Mont. Code Ann. § 72-2-521(1).


261 Mont. Code Ann. § 72-2-526 provides:

258 Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute. Neb. Rev. Stat. § 50-2327.

270 Neb. Rev. Stat. § 30-2328, the Nebraska holograph statute, provides as follows:
was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or filiation; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.\(^{271}\)

- **Compliance.** Nebraska has not enacted a harmless error statute.

29. Nevada

The Nevada statute is patterned after the Statute of Frauds. Nev. Rev. Stat. § 133.040 provides:

No will executed in this State, except such electronic wills\(^{272}\) or holographic wills as are mentioned in this chapter, is valid unless it is in writing and signed by the testator, or by an attending person at the testator’s express direction, and attested by at least two competent witnesses who subscribe their names to the will in the presence of the testator.

Set forth below is a quick examination of the specific Nevada will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed, as long as it is done in the testator’s presence and by his or her express direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness the testator’s signature. In addition, the witnesses must subscribe the will.

- **Presence.** The presence requirements are: (1) the attesting witnesses must sign in the presence of the testator; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and by his or her direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A holographic will is permitted if the material provisions, the date, and the signature are by the testator’s hand.

\(^{273}\) Nevada law also allows electronic wills.\(^{274}\)

- **Choice of Law.** The choice of law statute will recognize as valid a written will, subscribed by the testator, executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.\(^{275}\)

- **Compliance.** Nevada has not adopted a harmless error statute.

30. New Hampshire

The New Hampshire statute is patterned after the Statute of Frauds.


To be valid, a will or codicil to a will shall:

I. Be made by a testator . . . ; and

II. Be in writing; and

III. Be signed by the testator, or by some other person at his or her express direction in his or her presence; and

IV. Be signed by 2 or more credible witnesses, who shall, at the request of the testator and in the testator’s presence, attest to the testator’s signature.

Set forth below is a quick examination of the specific New Hampshire will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed, as long as it is done in the testator’s presence and by his or her direction.

- **Witnesses.** Two witnesses are required. Witnesses must witness the testator’s signature. In addition, the witnesses must sign the will at the testator’s request.

- **Presence.** The presence requirements\(^{276}\) are: (1) the testator’s signature must be in the presence of at least two witnesses.

\(^{277}\) Nev. Rev. Stat. § 133.090 provides as follows:

1. A holographic will is a will in which the signature, date and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized. It is subject to no other form, and may be made in or out of this State.

2. Every person of sound mind over the age of 18 years may, by last holographic will, dispose of all of the same, real or personal, but the estate is chargeable with the payment of the testator’s debts.

3. Such wills are valid not having the same force and effect as if formally executed.

\(^{278}\) Nev. Rev. Stat. § 133.085.

\(^{279}\) Nev. Rev. Stat. § 135.060 provides:

1. Except as otherwise provided in chapter 133A of NRS, if in writing and subscribed by the testator, a last will and testament executed outside this State in the manner prescribed by the law, either of the state where executed or of the testator’s domicile, shall be deemed to be legally executed, and is of the same force and effect as if executed in the manner prescribed by the law of this State.

2. This section must be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

3. As used in this section, "subscribed" includes, without limitation, placing an electronic signature on an electronic will.

\(^{270}\) The Supreme Court of New Hampshire explained that:
attesting witnesses; (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and direction; and (3) the witnesses must attest to the testator’s signature in the testator’s presence.

- **Publication.** The testator must request the witnesses to attest to the testator’s signature.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute recognizes as valid a will executed with the formalities required at the time of will execution by the jurisdiction where the will was executed. 277

- **Compliance.** New Hampshire has not enacted a harmless error statute.

31. New Jersey

N.J. Rev. Stat. § 3B:3-2 provides (in part):

a. Except as provided in subsection b. and in [N.J. Rev. Stat. § 1B:3-3 (harmless error), a will shall be:

- (1) in writing;
- (2) signed by the testator or in testator’s name by some other individual in the testator’s conscious presence and at the testator’s direction; and
- (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

c. Intent that the document constitutes the testator’s will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator’s handwriting.

Set forth below is a quick examination of the specific New Jersey will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be signed at the end. A proxy signature is allowed as long as it is done in the testator’s conscious presence and by the testator’s direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of his or her will. In addition, the witnesses must sign the will within a reasonable time after witnessing the required aspects of the will’s execution.

- **Presence.** The only presence requirement is for a proxy signature. 278

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A holograph is permitted if the signature and the material provisions are in the testator’s handwriting. 279

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required:

  - (1) at the time of will execution by the jurisdiction where the will was executed;
  - (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or
  - (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality. 280

- **Compliance.** New Jersey has enacted a harmless error statute. 281

32. New Mexico

N.M. Stat. Ann. § 45-2-502 provides:

- Except as provided in Sections 45-2-506 [choice of law] and 45-2-513 [separate writing identifying tangible personal property] NMSA 1978, a will must be:

  - A. in writing;

  - B. signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

  - C. signed by at least two individuals, each of whom signed in the presence of the testator and of each other.

277 Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness the testator’s signing or acknowledgment in order to comply with the statute. N.J. Rev. Stat. § 3B:3-2.

278 N.J. Rev. Stat. § 3B:3-2(3).

279 N.J. Rev. Stat. § 3B:3-3 provides: A will is a validly executed if executed in compliance with N.J.S.A. 3B:3-2 or N.J.S.A. 3B:3-3 or its execution was in compliance with the laws of the place where it was executed, or with the laws of the place where at the time of execution or at the time of death the testator was domiciled, had a place of abode or was a national. 381

280 N.J. Rev. Stat. § 3B:3-3 provides:

- A. signed will is validly executed if executed in compliance with N.J.S.A. 3B:3-2 or N.J.S.A. 3B:3-3 if its execution was in compliance with the laws of the state or country where it was executed, may be proved and allowed in this state, and shall thereupon be as effective as it would have been if executed according to the laws of this state.

- B. a will made out of this state, and self-proved according to the laws of the state or country where it was executed, is self-proven in this state and shall be allowed as such by the probate court.

after each witnessed the signing of the will as described in Subsection B of the section.

Set forth below is a quick examination of the specific New Mexico will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in his or her conscious presence and by his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness the testator sign the will. In addition, the witnesses must sign the will.

- **Presence.** The presence requirements are: (1) the testator’s signature must be in the presence of at least two attesting witnesses; (2) the attesting witnesses must sign in the presence of the testator; (3) the attesting witnesses must sign in the presence of each other; and, (4) if the testator’s name is signed by someone else, the proxy signature must be signed in the testator’s conscious presence and at his or her direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile or nationality.282

- **Compliance.** New Mexico has not enacted a harmless error statute.

33. New York

N.Y. Est. Powers & Trusts Law § 3-2.1 provides (in part):

(a) Except for nuncupative and holographic wills... every will must be in writing, and executed and attested in the following manner:

(1) It shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction, subject to the following:

(A) The presence of any matter following the testator’s signature, appearing on the will at the time of its execution, shall not invalidate such matter preceding the signature as appeared on the will at the time of its execution, except that such matter preceding the signature shall not be given effect, in the discretion of the surrogate, if it is so incomplete as not to be readily comprehensible without the aid of matter which follows the signature, or if to give effect to such matter preceding the signature would subvert the testator’s general plan for the disposition and administration of his estate.

(B) No effect shall be given to any matter, other than the attestation clause, which follows the signature of the testator, or to any matter preceding such signature which was added subsequently to the execution of the will.

(C) Any person who signs the testator’s name to the will, as provided in subparagraph (1), shall sign his own name and affix his residence address to the will but shall not be counted as one of the necessary attesting witnesses to the will. A will lacking the signature of the person signing the testator’s name shall not be given effect; provided, however, the failure of the person signing the testator’s name to affix his address shall not affect the validity of the will.

(2) The signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction. The testator may either sign in the presence of, or acknowledge his signature to each attesting witness separately.

(3) The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will.

(4) There shall be at least two attesting witnesses, who shall, within one thirty day period, both attest the testator’s signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will. There shall be a rebuttable presumption that the thirty day requirement of the preceding sentence has been fulfilled. The failure of a witness to affix his address shall not affect the validity of the will.

(b) The procedure for the execution and attestation of wills need not be followed in the precise order set forth in paragraph (a) so long as all the requisite formalities are observed during a period of time in which, satisfactorily to the surrogate, the ceremony or ceremonies of execution and attestation continue.

Set forth below is a quick examination of the specific New York will execution requirements:

- **Testator’s Signature.** The testator must sign at the end. A proxy signature is allowed as long as it is done in the testator’s presence and at his or her direction. A person signing for the testator must sign his or her own name and provide his or her own address.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature. In addition, the witnesses must, within 30 days, sign their names and affix their residence address at the end of the will.
Presence. The presence requirements are: (1) the testator’s signature or acknowledgment of his or her signature must be in the presence of at least two attesting witnesses; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence.

Publication. The testator must declare to each of the attesting witnesses that the instrument to which his or her signature has been affixed is his or her will.

Holograph. Both holographic wills and nuncupative wills are permitted for those serving in or accompanying those serving in the armed services of the United States during an armed conflict (and mariners), and become void one year after discharge (or three years after wills were made for mariners). 284

Choice of Law. The choice of law statute will recognize as valid a written will executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile; or (3) at the time of death by the jurisdiction of the testator’s domicile. 284

Compliance. New York has not enacted a harmless error statute.

284 N.Y. Est. Powers & Trusts Law § 3-2.2 provides:
(a) For the purposes of this section, and as used elsewhere in this chapter:
(1) A will is nuncupative when it is unrevoked, and the making thereof by the testator and its provisions are clearly established by at least two witnesses.
(2) A will is holographic when its making entirely is the handwriting of the testator, and is not executed and attested in accordance with the formalities prescribed by N.Y. Est. Powers & Trusts Law §1-2.1.
(b) A nuncupative or holographic will is valid only if:
(1) A member of the armed forces of the United States while in actual military or naval service during a war, declared or undeclared, or other armed conflict in which members of the armed forces are engaged.
(2) A person who serves with or accompanies an armed force engaged in actual military or naval service during such war or other armed conflict.
(3) A mariner while at sea.
(c) A will authorized by this section becomes invalid:
(1) If made by a member of the armed forces, upon the expiration of one year following his discharge from the armed forces.
(2) If made by a person who serves with or accompanies an armed force engaged in actual military or naval service, upon the expiration of one year from the time the he has ceased serving with or accompanying such armed force.
(3) If made by a mariner while at sea, upon the expiration of three years from the time such will was made.
(d) If any person described in paragraph (c) lacks testamentary capacity at the expiration of the time limited therein for the validity of his will, such will shall continue to be valid until the expiration of one year from the time such person regains testamentary capacity.
(e) Nuncupative and holographic wills, as herein authorized, are subject to the provisions of this chapter to the extent that such provisions can be applied to such wills consistently with their character, or to the extent any such provision expressly provides that it is applicable to such wills.

284 N.Y. Est. Powers & Trusts Law § 3-5.1(c) provides:
A will disposing of personal property, wherever situated, or real property situated in this state, made within or without this state by a domiciliary or non-domiciliary thereof, is formally valid and admissible to probate in this state, if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of:

34. North Carolina
N.C. Gen. Stat. § 31-3.3 provides:
(a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
(b) The testator must, with intent to sign the will, do so by signing the will or by having someone else in the testator’s presence and at the testator’s direction sign the testator’s name thereon.
(c) The testator must signify to the attesting witnesses that the instrument is the testator’s instrument by signing it in their presence or by acknowledging to them the testator’s signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
(d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

Set forth below is a quick examination of the specific North Carolina will execution requirements:

Testator’s Signature. The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

Witnesses. Two witnesses are required. 285 The witness must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature. In addition, the witnesses must sign the will.

Presence. The presence requirements are: (1) the testator’s signature or acknowledgment of his or her signature must be in the presence of at least two attesting witnesses; (2) the attesting witnesses must sign in the presence of the testator; and, (3) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and direction.

Publication. No publication or declaration by the testator is required.

Holograph. Holographic wills are permitted if written entirely in the handwriting of the testator and subscribed by the testator in his or her own handwriting. The statute provides that when all the words appearing on a paper in the testator’s handwriting are sufficient to constitute a valid

285 A notary public may act as a witness and the fact that the notary “signed in a separate place from the other witnesses, does not preclude the notary from being considered an attesting witness, if the testator requested that the notary attend his signature.” In re Will of Fridly, 64 S.E.2d 454, 459 (N.C. Ct. App. 2003)
holographic will the fact that other words or printed matter appear on the paper that are not in the testator’s handwriting and that do not affect the meaning of the handwritten words does not affect the will’s validity.208

- **Choice of Law.** A will is only valid if it complies with the execution requirements in North Carolina.209
- **Compliance.** North Carolina has not enacted a harmless error statute.

35. **North Dakota**

N.D. Cent. Code § 30.1-08-02 provides:
1. [A] will must be:
   a. In writing.
   b. Signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction.
   c. Either signed:
      (1) By at least two individuals, each of whom signed within a reasonable time after witnessing either the signing of the will as described in subdivision b or the testator’s acknowledgment of that signature or acknowledgment of the will;
      or
      (2) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.
   2. A will that does not comply with subsection 1 is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

Set forth below is a quick examination of the specific North Dakota will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s conscious presence and by his or her direction.
- **Witnesses.** Unless the notarial will option is used, two witnesses are required. The witness must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign within a reasonable time after witnessing. An untested will can be valid if acknowledged by the testator before a notary.
- **Presence.** The only presence requirement is for a proxy signature.210
- **Publication.** No publication or declaration by the testator is required.
- **Holograph.** A holograph is permitted if the signature and material portions of the document are in the testator’s handwriting.
- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a will that is executed with the formalities required: (1) at the time of will execution by the jurisdiction where executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.211
- **Compliance.** North Dakota has not enacted a harmless error statute.

36. **Ohio**

Ohio Rev. Code Ann. § 2107.03 provides:
Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator’s conscious presence and at the testator’s express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator’s signature.

For purposes of this section, “conscious presence” means within the range of any of the testator’s senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communications.

Set forth below is a quick examination of the specific Ohio will execution requirements:

- **Testator’s Signature.** The testator must sign at the end. Proxy signature is allowed as long as it is done in the testator’s conscious presence and by his or her direction.
- **Witnesses.** Two witnesses are required. The witness must witness: (1) the testator’s signature; or (2) the testa-
tor's acknowledgment of his or her signature. In addition, the witnesses must subscribe the will:

- **Presence.** The presence requirements are: (1) the attesting witnesses must attest and subscribe in the testator's conscious presence; and, (2) if the testator's name is signed by someone else, the proxy signature must be in the testator's conscious presence and direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** A will is only valid if it complies with the execution requirements in Ohio.290

- **Compliance.** Ohio has enacted a limited harmless error statute.291

37. **Oklahoma**


Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person, in his presence and by his direction, must subscribe his name thereto.

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them, to have been made by him or by his authority.

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will.

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will at the testator's request and in his presence.

290 Ohio Rev. Code Ann. § 2107.08(A) provides: "The probate court shall declare the will valid if after conducting a proper hearing . . . it finds the will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution. . . ."

291 In 2006, the state legislature enacted Ohio Rev. Code Ann. § 2107.24 provides as follows:

(A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:

1. The decedent prepared the document or caused the document to be prepared.

2. The decedent signed the document and intended the document to constitute the decedent's will.

3. The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telepathic, electronic, or other distant communication.

(B) If the probate court holds a hearing pursuant to division (A) of this section and finds that the proponent of the document as a purported will has established, by clear and convincing evidence, the requirements under divisions (A)(1), (2), and (3) of this section, the executor may file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document.

292 See In re Estate of Mowry, 973 P.2d 345, 350 (Okla. Civ. App. 1998) ("Substantial, not unif, compliance is required for proper attestation, publication and acknowledgment of a will.").

293 Okla. Stat. Ann. tit. 84, § 71.73, 75. Okla. Stat. Ann. tit. 84, § 71.11 provides: "A will, or a revocation thereof, made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or to which it was last directed to be transported, as if it were made in this state, and according to the provisions of this article. (Emphasis added.)"

Set forth below is a quick examination of the specific Oklahoma will execution requirements:

- **Testator's Signature.** The testator must sign at the end. A proxy signature is allowed as long as it is done by the testator's presence and by his or her direction.

- **Witnesses.** Two witnesses are required. The witness must witness: (1) the testator's signature; or (2) the testator's acknowledgment of his or her signature. In addition, the witnesses must sign at the end of the will.

- **Presence.** The presence requirements are: (1) the testator's signature or acknowledgment of his or her signature must be in the presence of the attesting witnesses; (2) the attesting witnesses must sign in the presence of the testator; and, (3) if the testator's name is signed by someone else, the proxy signature must be in the testator's presence and direction.

- **Publication.** The testator must declare to the attesting witnesses that the instrument is his or her will.

- **Holograph.** A holograph is permitted if it is entirely written, dated, and signed by the testator.

- **Choice of Law.** The choice of law statute will recognize as valid a will executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator's domicile.

- **Compliance.** Oklahoma has not enacted a harmless error statute.

38. **Oregon**

Or. Rev. Stat. § 112.235 provides (in part):

A will shall be in writing and shall be executed with the following formalities:

1. (1) The testator, in the presence of each of the witnesses, shall:

   a. Sign the will; or

   b. Direct one or more of the witnesses or some other person to sign thereon the name of the testator; or

   c. Acknowledge the signature previously made on the will by the testator at the direction of the testator.

2. (2) Any person who signs the name of the testator as provided in subsection (1)(b) of this section shall sign the signer's own name on the will and write on the will that the signer signed the name of the testator at the direction of the testator.

3. (3) At least two witnesses shall each:

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(a) See the testator sign the will; or
(b) Hear the testator acknowledge the signature on the will; and
(c) Attest the will by signing the witness’ name to it.

Set forth below is a quick examination of the specific Oregon will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is in the testator’s presence and by the testator’s direction and the proxy must sign his or her own name and write on the will that the proxy signed the name of the testator at the direction of the testator.

- **Witneses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of the signature. In addition, the witnesses must sign the will.

- **Presence.** The presence requirements are: (1) the testator’s signature or acknowledgment of his or her signature must be in the presence of at least two attesting witnesses; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and at his or her direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute will recognize as valid a written will executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile; or (3) at the time of death by the jurisdiction of the testator’s domicile. 395

- **Compliance.** Oregon has not enacted a harmless error statute.

395 The Oregon choice of law statute, Or. Rev. Stat. § 112.255, provides: (1) A will is lawfully executed if it is in writing, signed by or at the direction of the testator and otherwise executed in accordance with the law of:
   (a) This state at the time of execution or at the time of death of the testator; or
   (b) The domicile of the testator at the time of execution or at the time of the testator’s death; or
   (c) The place of execution at the time of execution.
   (2) A will is lawfully executed if it complies with the Uniform International Wills Act.

Set forth below is a quick examination of the specific Pennsylvania will execution requirements:

- **Testator’s Signature.** The testator must sign the will at the end. The testator’s signature may also be made by mark or by proxy in the testator’s presence and by his or her direction. In the case of testator’s signature by mark or by proxy, the testator’s name must be subscribed on the will.

- **Witneses.** No witnesses are required if the will is signed by the testator. If, however, the will is signed only by mark or by proxy, two witnesses are required. If testator’s signature is by mark, the witnesses must see the testator make his or her mark on the will and each witness must sign the will. If the testator’s signature is made by proxy, the witnesses must witness the testator’s declaration that the instrument is his or her will, and each witness must sign the will.

- **Presence.** The presence requirements are: (1) if the testator’s signature is made by mark, the mark must be made in the presence of at least two attesting witnesses; (2) if the testator’s signature is signed by proxy, the testator must declare the instrument to be his or her will in the presence of at least two attesting witnesses; and, (3) whether signed by mark or proxy, the witnesses must sign their names to the will in the presence of the testator.

- **Publication.** If the testator’s signature is signed by proxy, the testator must declare the instrument to be his or her will.

- **Holograph.** A nonattested will that is signed by the testator is permitted.

- **Choice of Law.** A will is valid if executed in compliance with the law required (1) at the time of will execution by the jurisdiction of the testator’s domicile; or (2) at the time of death by the jurisdiction of the testator’s domicile.

- **Compliance.** Pennsylvania has not enacted a harmless error statute.

396 The Pennsylvania choice of law statute, 20 Pa. Cons. Stat. Ann. § 2504.1, provides: “A will is validly executed if executed in compliance with [20 Pa. Cons. Stat. Ann. § 2501] relating to form and execution of a will, or in compliance with the law of the jurisdiction where the testator was domiciled at the time of the execution of the will or at the time of his death.”

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40. Rhode Island
R. I. Gen. Laws § 33-5-5 provides (in part):
No will shall be valid . . . unless it shall be in writing and signed by the testator, or by some other person for him or her in his or her presence and by his or her express direction; and this signature shall be made or acknowledged by the testator in the presence of two (2) or more witnesses present at the same time, and the witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary, and no other publication shall be necessary.
Set forth below is a quick examination of the specific Rhode Island will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not need to be at the end. A proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature. In addition, the witnesses must subscribe the will.

- **Presence.** The presence requirements are: (1) the testator’s signature or acknowledgment of his or her signature must be in the presence of at least two attesting witnesses; (2) the attesting witnesses must sign in the presence of the testator; (3) the attesting witnesses must sign in the presence of each other; and, (4) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and at his or her direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute will recognize as valid a written will, subscribed by the testator, executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.

- **Compliance.** Rhode Island has not enacted a harmless error statute.

41. South Carolina
S.C. Code Ann. § 62-2-502 provides:
Except as provided for writings within Section 62-2-512 [separate writing for tangible, personal property] and wills within Section 62-2-505 [choice of law], every will, shall be:

(1) in writing;
(2) signed by the testator or in the testator’s name by some other individual in the testator’s presence and by the testator’s direction; and
(3) signed by at least two individuals each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will.

Set forth below is a quick examination of the specific South Carolina will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign the will.

- **Presence.** The only presence requirement is for a proxy signature.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** Holographic wills are not permitted.

- **Choice of Law.** The choice of law statute will recognize as valid a written will executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile; or (3) at the time of death by the jurisdiction of the testator’s domicile.

- **Compliance.** South Carolina has not enacted a harmless error statute.

42. South Dakota
S.D. Codified Laws Ann. § 29A-2-502 provides (in part):
(a) A will is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting;
(b) A will not valid as a holographic will must be:
   (1) in writing;
   (2) Signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and
   (3) Signed in the conscious presence of the testator by two or more individuals who, in the

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200 R.I. Gen. Laws § 33-5-7 provides: Any last will and testament executed outside this state in the mode prescribed by the law, either at the place where executed or of the testator’s domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state; provided, the last will and testament is in writing and subscribed by the testator.


203 Although the statute does not require the witnesses to sign in the testator’s presence, they must actually witness in order to comply with the statute.

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conscious presence of the testator, witnessed either the signing of the will or the testator’s acknowledgment of that signature.

Set forth below is a quick examination of the specific South Dakota will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s conscious presence and by his or her direction.

- **Witnesees.** Two witnesses are required. The witnesses must witness either: (1) the signing of the will; or (2) the testator’s acknowledgment of that signature. In addition, the witnesses must sign the will.

- **Presenee.** The presence requirements are: (1) the testator’s signature or acknowledgment of his or her signature must be in the conscious presence of at least two attesting witnesses; (2) the attesting witnesses must sign in the conscious presence of the testator; and, (3) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s conscious presence and direction.

- **Publication.** No publication or declamation is required.

- **Hologrph.** Holographs are permitted if the signature and material “portions” are in the testator’s handwriting.

- **Choice of Law.** The choice of law statute tracks UPC § 2-206 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.

- **Compliance.** South Dakota has adopted the Revised UPC’s harmless error statute.

43. *Tennessee*

Tenn. Code Ann. § 32-1-104 provides:

The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and at least two (2) witnesses as follows:


302 S.D. Codified Laws Ann. § 29A-2-506 provides:

A written will is valid if executed in compliance with [S.D. Codified Laws] §§ 29A-2-303 or 29A-2-503 or if its execution complies with the law at the time of execution of the jurisdiction where the will is executed, of or the law of the jurisdiction where at the time of execution of or the time of death the testator is domiciled, has a place of abode, or is a national.

303 S.D. Codified Laws Ann. § 29A-2-503 provides that:

Although a document or writing added upon a document was not executed in compliance with [S.D. Codified Laws Ann.] § 29A-2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the document intended the document or writing to constitute: (i) the doc- eunt’s will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a separate or complete renewal of a formerly revoked will or of a formerly revoked portion of the will.

304 In Taylor v. Holt, 134 S.W.3d 838 (Tenn. Ct. App. 2003), the validity of an electronic signature was at issue. The court first articulated the statutory definition of “signature” as including “a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record.” 134 S.W.3d at 833 (quoting Tenn. Code Ann. § 1-3-105'(27) (1999)). The court held that “the computer generated signature made by the Decedent” complied with this definition. Id. at 833. The court noted that the testator “simply used a computer rather than an ink pen as the tool to make his signature.” Id. For a discussion of this case, in particular, and the validity of a testator’s signature, in general, see Ross, “Probate — Taylor v. Holt: The Tennessee Court of Appeals Allows a Computer Generated Signature to Validate a Testamentary Will,” 35 U. Mem. L. Rev. 663 (2005).

305 Tenn. Code Ann. § 32-1-105 provides: “No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and his handwriting must be proved by two (2) witnesses.

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required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.307

- **Compliance.** Tennessee has not enacted a harmless error statute.

44. **Texas**

Tex. Est. Code § 251.051308 provides:

Except as otherwise provided by law, a last will and testament must be:

(1) in writing;
(2) signed by:
   (A) the testator in person; or
   (B) another person on behalf of the testator:
      (i) in the testator’s presence; and
      (ii) under the testator’s direction; and
   (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their name to the will in their own handwriting in the testator’s presence.

Set forth below is a quick examination of the specific Texas will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not need to be at the end.309 A proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

- **Witnesses.** Two witnesses above the age of 14 years are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of the will.310 In addition, the witnesses must subscribe the will.

- **Presence.** The presence requirements are: (1) the testating witnesses must sign in the presence of the testator; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and by his or her direction.

307 Tex. Code Ann. § 32-1-107 provides:

A will executed outside this state in a manner prescribed by [Tenn. Code Ann.] §§ 32-1-101–32-1-108, inclusive, or a will written outside this state in a manner prescribed by the laws of the place of its execution or by the law of the domicile of the testator at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with those sections.


309 With respect to both attested and holographic wills, the “Texas courts have been lenient concerning the location and form of a ‘signature.’” {Luker v. Stroempweer, 36 S.W.3d 628, 630 (Tex. App. 2000).

310 The Texas courts have defined attestation as “the act of witnessing the performance of the statutory requirements to a valid execution of the will.” Brown v. Tidwell, 210 S.W.3d 648, 661 (Tex. App. 2006) (quoting Zarate v. Schmooker, 178 S.W.2d 542, 543 (Tex. Civ. App. 1944)). Furthermore, “[t]he witnesses need not be the testator sign the will, as long as they can attest, from direct or circumstantial facts, that the testator in fact executed the document that they are signing.” Id. In addition, some courts have held that the will was valid when the testator did not sign in front of the witnesses but the will was “sufficiently acknowledged by [the witnesses] to the witnesses as his will.” Franklin v. Martin, 73 S.W.2d 919, 920 (Tex. Civ. App. 1954).

- **Publication.** No publication or declaration is required.

- **Holograph.** A holograph is permitted if written wholly in the handwriting of the testator and signed by the testator.

- **Choice of Law.** Texas appears to follow the common law rule regarding choice of law.

45. **Utah**

Utah Code Ann. § 75-2-502(1) provides:

- a will shall be:
  (a) in writing;
  (b) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and
  (c) signed by at least two individuals, each of whom signed within a reasonable time after he witnessed either the signing of the will as described in Subsec- tion (1)(b) or the testator’s acknowledgment of that signature or acknowledgment of the will.

Set forth below is a quick examination of the specific Utah will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not need to be at the end. A proxy signature is allowed as long as it is done in the testator’s conscious presence and by his or her direction.

- **Witnesses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; (2) the testator’s acknowledgment of his or her signature; or (3) the testator’s acknowledgment of the will. In addition, the witnesses must sign within a reasonable time.

- **Presence.** The only presence requirement is for a proxy signature.311

- **Publication.** No publication or declaration is required.

- **Holograph.** A holograph is permitted if the signature and material “portions” are in the testator’s handwriting.

- **Choice of Law.** The choice of law statute tracks UPC § 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s domicile, abode, or nationality; or (3)
at the time of death by the jurisdiction of the testator’s domicile, abode, or nationality.\textsuperscript{314}

\textbullet\ Compliance. Utah has enacted a harmless error statute.\textsuperscript{315}

46. Vermont


Except such nuncupative wills as are hereinafter mentioned, a will shall not pass any real or personal estate, or charge or affect the same, unless it is in writing and signed by the testator, or by the testator’s name written by some other person in the testator’s presence and by the testator’s express direction, and attested and subscribed by two or more credible witnesses in the presence of the testator and each other.

Set forth below is a quick examination of the specific Vermont will execution requirements:

\textbullet\ Testator’s Signature. The testator must sign the will, but it need not be at the end. A proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

\textbullet\ Witnesses. Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature.\textsuperscript{317} In addition, the witnesses must subscribe their names to the will.

\textbullet\ Presence. The presence requirements are: (1) the attesting witnesses must sign in the presence of the testator; (2) the attesting witnesses must sign in the presence of each other; and, (3) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and at his or her direction.

\textbullet\ Publication. No publication or declaration by the testator is required.

\textbullet\ Holograph. Holographic wills are not permitted.

\textbullet\ Choice of Law. The choice of law statute will recognize as a valid written will, subscribed by the testator, executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; or (2) at the time of execution by the jurisdiction of the testator’s domicile.\textsuperscript{318}

\textbullet\ Compliance. Vermont has not enacted a harmless error statute.

47. Virginia

Va. Code Ann. § 64.2-403 provides:

A. No will shall be valid unless it is in writing and signed by the testator, or by some other person in the testator’s presence and by his direction, in such a manner as to make it manifest that the name is intended as a signature.

B. A will wholly in the testator’s handwriting is valid without further requirements, provided that the fact that a will is wholly in the testator’s handwriting and signed by the testator is proved by at least two disinterested witnesses.

C. A will not wholly in the testator’s handwriting is not valid unless the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator. No form of attestation of the witnesses shall be necessary.

Set forth below is a quick examination of the specific Virginia will execution requirements:

\textbullet\ Testator’s Signature. The testator must sign the will, but it does not need to be at the end. A proxy signature is allowed as long as it is done in the testator’s presence and by his or her direction.

\textbullet\ Witnesses. Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgment of his or her signature.

\textbullet\ Presence. The presence requirements are: (1) testator’s signature or acknowledgment of his or her signature must be in the presence of the attesting witnesses; (2) the attesting witnesses must subscribe in the presence of the testator; and, (3) the attestings must subscribe in the presence of the
ence of each other; and, (4) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and at his or her direction.

- **Publication.** No publication or declaration by the testator is required.

- **Holograph.** A holograph is permitted if "wholly" in the handwriting of the testator.

- **Choice of Law.** The choice of law statute recognizes as valid a will executed with the formalities required at the time of will execution by the jurisdiction of the testator’s domicile.

- **Compliance.** Virginia has not enacted a harmless error statute.

48. Washington

Wash. Rev. Code § 11.12.020(1) provides (in part): Every will shall be in writing signed by the testator or by some other person under the testator’s direction in the testator’s presence, and shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with [Wash. Rev. Code] § 11.20.020(2), while in the presence of the testator and at the testator’s direction or request.

Set forth below is a quick examination of the specific Washington will execution requirements:

- **Testator’s Signature.** The testator must sign the will, but it does not need to be at the end. A proxy signature is allowed as long as it is done under the testator’s direction and in his or her presence.

- **Witneses.** Two witnesses are required. The witnesses must witness: (1) the testator’s signature; or (2) the testator’s acknowledgement of the signature. In addition, the witnesses must subscribe their names to the will or sign an affidavit pursuant to Wash. Rev. Code § 11.20.020(2).

- **Presence.** The presence requirements are: (1) the attesting witnesses must subscribe the will or sign an affidavit pursuant to Wash. Rev. Code § 11.20.020(2) in the presence of the testator; and, (2) if the testator’s name is signed by someone else, the proxy signature must be in the testator’s presence and at his or her direction.

- **Publication.** No publication or declaration by the testator is required.

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104 Va. Code Ann. § 62.2-403. See Berry v. Tribble, 626 S.E.2d 440 (Va. 2006) (perpetual holographic will is valid if handwritten entries are interwoven with or joined to typewritten material or continue from typewritten material in physical form, by reference or its sequence of thought; holographic will may only be established upon consideration of all handwritten entries by testator on document and not upon consideration of only portions of those handwritten entries selected by will’s proponent).

105 Va. Code § 62.2-407 provides:

106 Wash. Rev. Code § 11.12.020 provides (in part): A last will and testament, executed in the same form prescribed by the law of the place where executed or of the testator’s domicile, either at the time of the will’s execution or at the time of the testator’s death, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.

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the signature, whether the testator’s or by proxy, must be in the conscious presence of the attesting witnesses; and, (2) if testator’s name is signed by someone else, the proxy signature must be in the testator’s conscious presence and at his or her direction.

• Publication. No publication or declaration by the testator is required.

• Holograph. Holographic wills are not permitted.

• Choice of Law. The choice of law would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator’s residence, domicile, or nationality; or (3) at the time of death by the jurisdiction of the testator’s residence, domicile, or nationality.

• Compliance. Wisconsin has not enacted a harmless error statute.

51. Wyoming

Wyo. Stat. § 2-6-112 provides:

all wills to be valid shall be in writing, or typewritten, witnessed by two (2) competent witnesses and signed by the testator or by some person in his presence and by his direction. If the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency shall not prevent the probate and allowance of the will. No subscribing witness to any will can derive any benefit therefrom unless there are two (2) disinterested and competent witnesses to the same, but if without a will the witness would be entitled to any portion of the testator’s estate, the witness may still receive the portion to the extent and value of the amount devised.

Set forth below is a quick examination of the specific Wyoming will execution requirements:

• Testator’s Signature. The testator must sign the will, but it does not need to be at the end. A proxy signature is allowed as long as it is done in the testator’s conscious presence and by his or her direction. If the testator is unable to sign the will on his or her own, with the consent of the testator, another person can help the testator sign the will.

• Witnesses. Two witnesses are required. Each witness must witness either the testator’s: (1) signing of the will; (2) implicit or explicit acknowledgement of the will, whether it is the testator’s signature or a proxy signature. The witnesses can witness the signing or acknowledgment at different times. In addition, each witness must sign the will within a reasonable time after witnessing the signing or acknowledgment. The witnesses may sign at different times.

• Presence. The presence requirements are: (1) the testator’s acknowledgment of the will or acknowledgment of

352 Wis. Stat. § 853.03 provides:

(1) A will is validly executed if it is in writing and any of the following apply:

(a) The will is executed according to s. 853.03

(b) The will is executed in accordance with the law, at the time of execution or at the time of death, of any of the following:

1. The place where the will was executed.

2. The place where the testator resided, was domiciled or was a national at the time of execution.

(2) Any will under sub. (1)(b) has the same effect as if executed in the state in compliance with s. 853.03.
Detailed Analysis

* Presence. The only presence requirement is for a proxy signature.\(^{255}\)

* Publication. No publication or declaration by the testator is required.

* Holograph. A holograph is permitted if entirely in the handwriting of the testator and signed by his or her hand.\(^{256}\)

\(^{255}\)Although the statute does not require the witnesses to sign in the testator's presence, they must actually witness in order to comply with the statute. Wyo. Stat. \$ 2-6-112.

\(^{256}\)Wyo. Stat. Ann. \$ 2-6-113 provides: "A will which does not comply with Wyo. Stat. section 2-6-112 is valid as an holographic will, whether or not witnessed, if it is entirely in the handwriting of the testator and signed by the hand of the testator himself."

* Choice of Law. The choice of law statute tracks UPC \$ 2-506 and would recognize as valid a written will that was executed with the formalities required: (1) at the time of will execution by the jurisdiction where the will was executed; (2) at the time of will execution by the jurisdiction of the testator's domicile, abode, or nationality; or (3) at the time of death by the jurisdiction of the testator's domicile, abode, or nationality.\(^{257}\)

* Compliance. Wyoming has not enacted a harmless error statute.

\(^{257}\)Wyo. Stat. \$ 2-6-116 provides: A will is valid if executed in compliance with W.S. 2-6-112 or 2-6-113 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.
III. Testamentary Capacity and Undue Influence

In addition to attacks based on lack of full observation of formalities, wills are susceptible to challenges on a variety of grounds having to do with the mental state of the testator at the time of the will's execution. The scope and shape of such challenges are mostly the product of judicial interpretation, as state statutes (and the UPC) provide little guidance as to a testator's requisite mental condition.

The general rule is that the testator must be of "sound mind" at the time of will execution — a threshold endorsed by UPC § 2-501. However, the official comments to the section shed no light on just what might constitute a "sound mind." State statutes universally adopt the "sound mind" standard but generally fail to define or explain it.

As a result of the statutory silence, it has been left to the courts to derive the grounds for successful challenges to the "sound mind" requirement. A testator cannot have satisfied the sound mind requirement, for example, if he or she was unaware of the contents of a will he or she subscribed. Similarly, courts have upheld challenges to a will on the grounds that the testator was deranged at the time of will execution. However, the two most prevalent challenges to a testator's mental fitness are lack of testamentary capacity and undue influence (i.e., influence was exerted that the testator's free will and substituted another person's volition for that of the testator). Lack of capacity and undue influence are analyzed in some detail below. In each case, a discussion of the general principle is followed by an illustration of the principle's application in several selected states.

Challenges to a testator's "sound mind" often turn on procedural issues, such as the allocation of the burden of proof. The rule for most states, found in UPC § 3-407, is that the proponent of a will must prove that there was compliance with will formalities, but the burden of proof is on the contestant for challenges based on the testator's mental condition. Proponents of the will have the burden of establishing prima facie proof of due execution in all cases, and if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.

Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.

State law is less uniform as to the evidentiary standard required of the successful party. Some states allow for merely a preponderance of the evidence, while others require a "clear and convincing" showing. A state-by-state analysis of the relevant proof standard is beyond the scope of this Portfolio, and the practitioner is advised to familiarize himself or herself with the applicable law in his or her jurisdiction before counseling or embarking on litigation.

A. Testamentary Capacity

With little variation, state courts determine testamentary capacity by reference to a four-pronged analysis of the testator's state of mind at the time of will execution. Although the phrasing differs from state to state, the courts generally find capacity when the testator is able to comprehend:

- the nature and extent of his or her property;
- the natural objects of his or her bounty;
- the disposition he or she wishes to make of his or her estate; and
- the act of making a will.

A testator is deemed to have the requisite capacity if, and only if, he or she satisfies each and every element of the test. Courts purport to analyze capacity through an independent application of the four factors of the test. A careful reader of the case law, however, will notice the inexactitude this process entails in practice. To say that the cases are fact-intensive and there is some imprecision in applying the factors is to alert the practitioner to the truth that there is a great (and sometimes disproportionate) interplay among the factors. In some instances, the existence of one factor may greatly diminish the significance of another, and more than a few opinions appear to be result driven, with the application of the factors little more than a pretense to get to a predetermined result. For example, if a testator seems to have a firm grasp of the individuals who would naturally take from him or her and leaves his or her property to those individuals, evidence of his or her failure to understand his or her property, the terms of his or her will, or the fact he or she is in the process of executing a will is often glossed over in favor of upholding the will.

1. The Four-Pronged Test

a. The Nature and Extent of His or Her Property

The testator need not know the exact fair market value of his or her property, nor be able to list all of his or her assets. The level of knowledge required regarding his or her holdings varies. At a minimum, the testator should possess a general knowledge of his or her assets.

b. The Natural Objects of His or Her Bounty

The term "natural objects" means those persons related to the testator by ties of blood or affection who would naturally be...
thought of as having a stake in the testator's estate. The testator is not required under this prong to leave anything in the will to the natural objects of his or her bounty, but he or she is required to know who they are. Thus, this element is satisfied if the testator understood who would naturally be expected to receive his or her property at his or her death. The specificity with which the testator must know the names and the relationship to him or her of the natural objects varies considerably.

c. The Disposition the Testator Wishes to Make of His or Her Estate

The testator is required to dispose of his or her property according to some plan formed in his or her mind. He or she clearly must know to whom he or she intends to give his or her property through the will. Some wills are simple. Other wills contain complex distribution schemes and even more complex tax formulations. The extent to which the testator must understand the details of the estate plan varies by state.

d. The Act of Making a Will

The testator must know that the document he or she is signing will serve to dispose of his or her property at his or her death according to the directions therein. In other words, the testator has to know that the function of a will is to distribute his or her property after his or her death, and he or she must understand that he or she is about to execute such a document.

2. Lucid Intervals and Insane Delusion

Capacity is measured at the moment when the will is executed. A testator who generally lacks capacity can execute a valid will if he or she enters into a "lucid interval." Conversely, a testator who is otherwise able to satisfy the capacity tests may have his or her will or a provision thereof stricken if it is the product of an "insane delusion." A lucid interval is a period of time during which an otherwise questionable testator has returned to a state of comprehension and possesses actual testamentary capacity. An insane delusion exists when a "person persists in believing supposed facts that have no real existence, and so believes each supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts himself as if such facts actually existed." Accordingly, if there is any factual basis for a testator's otherwise irrational belief, the courts will not find an insane delusion.

3. Procedural and Evidentiary Issues

In many states, a testator is presumed to possess adequate testamentary capacity. That presumption is rebutted only by a strong showing of incapacity. Some states provide that if, at the time of will execution, the testator is under a conservatorship or guardianship, lack of capacity is presumed. However, in states where the proponent must make a prima facie case of testamentary capacity, testimony establishing the independence of the testator is relevant. Because of state variations (a survey of which is beyond the scope of this publication), the practitioner is well advised to research the applicable presumptions for his or her particular jurisdiction.

Comment: Before executing a will, the attorney should always ask questions of the client to ensure that the client has testamentary capacity. The questions should clearly confirm that the testator understands: (1) who are the persons who would be the natural objects of his or her bounty; (2) the assets he or she holds; (3) the disposition he or she wants to make of his or her assets; and (4) the significance and effect of the act of making a will. The questions should refer to the client's family members and assets with some specificity. If the client is unable to respond to any one of those questions, the client should not be allowed to execute the will. The attorney should attempt to ascertain whether any other attorneys have refused to write a will for the client, and if so, why.

Due to the fact-intensive nature of the four-prong test, courts generally examine a myriad of objective and subjective facts. Each case is unique, but certain facts have been known to affect the outcome. For example, while a testator's mental infirmity, severe intoxication, or sedation alone do not establish lack of capacity, such facts would certainly be evidentiary factors weighed by the court in determining if the testator were able to comprehend the nature and extent of his or her property, the natural objects of his or her bounty, the disposition he or she is making, and the fact that he or she is in the act of making a will. In capacity cases, medical evidence (such as medical records and the testimony of medical professionals) is often persuasive. On the other hand, the testimony of lay witnesses that is particularly reliable may overcome medical evidence. A more detailed analysis of four states illustrates the application of the test to various facts.

4. Illustrative States for Testamentary Capacity

a. Kentucky

(1) In General

The requisite capacity to make a will is referred to as "minimal in Kentucky." In fact, less capacity is required to execute a will than is necessary to make a deed or enter into a contract. Kentucky adheres to the principle of "testatorial absolutism," which means that "the privilege of the citizens of the Commonwealth to draft wills to dispose of their property is zealously guarded by the courts and will not be disturbed based on remote or speculative evidence." Kentucky's variation of the four-prong test for testamentary capacity requires that a testator know the natural objects of his or her bounty; know his or her obligations to them; know the character and value of his or her estate; and dispose of his or her estate according to his or her own fixed purpose.

In Kentucky, the requirement that the testator know the natural objects of his or her bounty does not mean that the testator must have had "actual knowledge of the objects"; rather it requires only that the testator had "sufficient mind to

331 Bue v. Moldingg, 975 S.W.2d 451, 455 (Ky. 1998).
332 Id.
333 Id.
334 Id. The conventional requirement that the testator know that he or she is making a will is not expressly required but is implicit in the application of the test.
know the objects of his bounty.\textsuperscript{238} For example, in Williams \textit{v. Vollman},\textsuperscript{239} the testator was in a nursing home when his wife and daughter died. Because of his frail emotional state, he was not told of their deaths. The testator’s granddaughter contested her grandfather’s will on the grounds that her grandfather did not know the natural objects of his bounty, since he was unawake when he executed the will that his wife and daughter had predeceased him.\textsuperscript{240} The court rejected the granddaughter’s argument on the grounds that there was sufficient evidence that the testator would have understood the deaths of his wife and daughter if he had been informed of them. That the testator was in the dark about the death of the natural objects of his bounty did not refute his ability to understand who they were (or had been).\textsuperscript{241} Kentucky adds a gloss to the “natural objects” prong, requiring that the testator know his or her “obligations” to them. The courts have made clear, however, that it need only be shown that the testator understands his or her obligations to the natural objects of his or her bounty. The testator need not leave anything to every heir and need not even mention all of the objects of his or her bounty in the will. Indeed, the testator is “free to ignore [his duties to the natural objects of his bounty] if he is otherwise of sound mind.”\textsuperscript{242} Kentucky also requires the testator to know the character and value of his or her estate and to dispose of his or her estate according to his or her own fixed purpose. This requires that the testator have some sort of plan in disposing of his or her estate.\textsuperscript{243} Therefore, as long as there is some sort of plan that shows the testator had a purpose in disposing of his or her estate, this prong is satisfied even if others may not agree with the testator’s purpose.\textsuperscript{244} For example, in Wiggens \textit{v. General Ass’n of Baptists of Kentucky}, the testator devised a significant portion of her estate to church groups instead of to her first and second cousins. According to the Wiggens court, the testator’s life-long interest in church work demonstrated that she had a purpose for the devise. Thus, she satisfied the requirement of understanding the disposition of her estate.\textsuperscript{245}

\begin{enumerate}
\item (2) Lucid Intervals and Insane Delusions
\end{enumerate}

Since testamentary capacity is determined as of the time the will is executed,\textsuperscript{246} a testator who is unable generally to satisfy the required tests for capacity may execute a valid will if he or she is lucid at the time of execution. As applied in Kentucky, the “lucid interval” doctrine presumes that a testator executing a will has capacity if he or she is “suffering from a mental illness, which ebbs and flows in terms of its effect on the testator’s mental competence.”\textsuperscript{247} This presumption of lucidity means that the “lucid interval” doctrine can prove determinative in Kentucky in cases where the testator is diagnosed with a disease that varies over time in its effect on a person’s mental abilities.

In \textit{Bye v. Mattingly},\textsuperscript{248} for example, about one year before executing his will, the testator had been diagnosed as suffering from Alzheimer’s disease. In upholding the testator’s will against a challenge of lack of capacity, the Kentucky Supreme Court acknowledged that there was no question that the testator suffered from Alzheimer’s disease, but that, under the lucid interval doctrine, “he is presumed to have been experiencing a lucid interval during the execution of the will.”\textsuperscript{249} The Bye court explained that the lucid interval doctrine was designed to deal with “precisely this type of illness,”\textsuperscript{250} which is characterized as a disease that is variable in its effect on the person’s mental abilities. The Bye court noted that the wisdom of the lucid interval presumption of lucidity during will execution was demonstrated in this case by evidence introduced about the testator’s mental state at one point in the intervening year between the date that the testator was diagnosed with the disease and the date the will was executed. About five months before will execution (but after the diagnosis), the testator had occasion to be questioned in a court hearing regarding a marriage petition. The Kentucky Supreme Court noted that, during the hearing about the marriage petition, the testator was clearly “lucid and demonstrated a complete grasp of the circumstances in which he found himself.”\textsuperscript{251} Accordingly, the testator could have had a similar lucid interval when he executed the will. In that case, the challenge to the will based on lack of capacity failed since the contestant was not able to introduce evidence to rebut the presumption that the testator executed the will during a lucid interval.\textsuperscript{252}

Conversely, a testator who is otherwise able to satisfy the capacity tests may have his or her will, or a provision thereof, stricken if it is the product of an insane delusion — a phenomenon discussed at length in \textit{American National Bank & Trust Co. v. Penner}. The Penner court observed that “[t]he essence of an insane delusion is that it has no basis in reason and cannot be dispelled by reason. The subject-matter must have no foundation in fact . . . . It must not be found on evidence. . . . A delusion is therefore to be distinguished from a mere mistaken opinion.”\textsuperscript{253} Thus, even though a testator’s disposition of his or her property does not coincide with the jury’s idea of who should receive the property, the will may still be valid. Also, a testator’s mistaken perception of a person that causes the testator to omit that person as a beneficiary under a will does not mean that the testator is suffering from an insane delusion. Thus, the Penner testator’s disinheritance of his son, based on the testator’s dislike of his son’s wife, did not demonstrate that the testator was suffering from an insane delusion, even if the testator disliked his daughter-in-law for irrational and untrue
reasons. By contrast, in Cahhage v. Gray, the Kentucky court found that the testator was suffering from an insane delusion when he disinherited his daughter. The evidence showed that the testator unjustifiably believed that his daughter’s husband was trying to kill him and had stolen property from him. In addition, the testator conversed with sticks and believed that there was a large and beautiful cave located under his property.

(3) Procedural and Evidentiary Issues

In Kentucky, there is a strong presumption that the testator had the requisite testamentary capacity; the contestor of the will carries the burden.684 Moreover, this presumption of capacity “can only be rebutted by the strongest showing of incapacity,”685 which has been interpreted as showing incapacity by “substantial evidence.”686 A mere showing of old age, possession of a “failing memory, momentary forgetfulness, weakness of mental powers or a lack of strict coherence in conversation does not render one incapable of validly executing a will.”687 In Kentucky, testators who suffered from deafness and retarded speech or those who were blind, paralyzed, or epileptic have been found to have the requisite capacity.688 Expert opinions are also not enough to overcome the burden. The opinions of “experts must be supported by proven facts.”689 This point is well illustrated in Fischer v. Heckerman, a case where the testator suffered a heart attack and a stroke seven days before executing his will. The court found that expert opinions regarding the effect of a lack of a heartbeat and of respiration and of the effect of psychosychoactive drugs needed factual support, such as medical records and the testimony of nurses who cared for the testator, before the issue of capacity could be determined.690 The presumption of capacity extends to those suffering from mental illnesses, including those where the effects on the testator’s mental competence ebb and flow (e.g., Alzheimer’s disease).691

In some states, an automatic presumption of lack of capacity attaches if a will has been executed after a guardian has been appointed for a testator. In Bye, the Kentucky Supreme Court expressly declined to make such a presumption.692 In that case, the testator had been adjudged partially disabled and a limited guardian had been appointed for him about one year before he executed his will.693 The Bye court refused to adopt a rule that a partial disability creates a presumption that a testator lacks testamentary capacity. The Kentucky court explained that it would be “incongruous for us now to announce a new rule of law which restricted these (testamentary) rights which we have held in such high regard for so long.”694 The court wrestled with the competing societal interests of: (1) protecting individuals who have been adjudged partially incapacitated; and (2) upholding testamentary freedom. The court explained that while the clear policy of the Commonwealth is that our citizens who are no longer able to fully care for themselves must be protected from the various societal predators, we will restrict their testamentary rights only when it is absolutely necessary, and even then only to the degree required to defend their interests.

Therefore, a person for whom a guardian has been appointed, or a person who has been adjudged disabled, enjoys the same presumption of capacity as a person who has not.

b. Pennsylvania

(1) In General

In Pennsylvania, the standard for testamentary capacity is a low.695 Less capacity is required to make a valid will than is required to transact ordinary business.696 The Pennsylvania Supreme Court in In re Estate of Kaczmar697 stated that the law on capacity is “well-settled” and that a testator possesses the requisite capacity “if he knows those who are the natural objects of his bounty, of what his estate consists, and what he desires done with it, even though his memory may have been impaired by age or disease.” The Kaczmar court explained that “old age, sickness, distress or debility of body neither proves nor raises a presumption of incapacity.”698

The requirement that the testator understand what “he desires done” with his or her estate has been interpreted as requiring the testator to know that he or she is making a disposition of his or her property at death and to be able to choose “with understanding and reason between one disposition and another.”699 Nevertheless, the courts in Pennsylvania have allowed a testator with failing mental abilities to satisfy this requirement when the distribution scheme of his or her will is fairly simple, such as leaving all of the estate to one beneficiary, an act that did not require the testator to deal with the issues of choosing or dividing his or her estate.700 Moreover, the requirement that the testator know of “what his estate consists” does not mean that the testator must have actual knowledge of all the property he or she owns; an understanding of the nature of his or her possessions is sufficient.701

The requirement that the testator “know those who are the natural objects of his bounty,” is somewhat harder to analyze. The Pennsylvania cases on this element are difficult to harmonize because it is unclear how specifically a testator must know

684 Id. at 753.
685 411 S.W.2d 28 (Ky. 1967).
686 Id.
687 See Bye v. Martin, 975 S.W.2d 451, 455 (Ky. 1998).
688 Id.
690 Bye, 975 S.W.2d at 456.
691 Fischer, 772 S.W.2d at 645.
692 Id.
693 Id.
694 Fischer, 772 S.W.2d at 645.
695 Bye, 975 S.W.2d at 456.
696 Id. at 457.
697 Id. at 454.
the names and numbers of those who would naturally stake a
claim to his or her estate. On the other hand, the Pennsylvania
courts have clearly stated that the element of knowing one’s
natural objects does not require the testator’s leave them
anything in the will. This principle is borne out in *Kuczyn.* In
case that, the testator executed his will while in the hospital.377
He had been admitted to the hospital in considerable pain and
was scheduled for gall bladder surgery the day after will execu-
tion.378 On the day of will execution, the testator was
described as “critically ill” and was given Denerol to relieve
the pain.379 In the will, the testator, a widower, left his entire
estate to only two of his six surviving children.380 Since evi-
dence was introduced that the testator recognized his other
children and knew who the six were, the element of knowing
his natural objects was satisfied. The Pennsylvania courts have
also stated that “a testator does not have to give any of his
property to those he loves, or to the relatives society believes
he should love, and he can give it in such a way that 99% of his
fellow-citizens believe is foolish, unjust, or outrageous.”381
The requirement is to be aware of those who would naturally
claim, not to actually leave them anything in the will.

(2) Lucid Intervals and Insane Delusions

The determinative time to consider capacity is at the time
of the execution of the will.382 A testator who is unable gener-
ally to satisfy the required tests for capacity may execute a
valid will if he or she is lucid at the time of execution. The lucid
interval doctrine has been used in Pennsylvania when the tes-
tator is suffering from a mental illness but has periods of
understanding.383 For example, in *Rupper’s Will,*384 the court
held that a testator who did not always know where she was, or
who thought she was at home when she was in a nursing home,
could still make a valid will if at the time of execution she
satisfied the test for capacity.

Conversely, a testator who is otherwise able to satisfy the
capacity tests may have his or her will, or a provision thereof,
stricken if it is the product of an insane delusion. According to
the court in *Leedum’s Estate,*385

A man may be of sound mind in regard to his dealings
in general, but he may be under an insane delusion; and
whenever it appears that the will was the direct
offspring of the partial insanity or paranoemia under
which the testator was laboring at the very time the
will was made, that it was the moving cause of the
disposition, and if it had not existed the will would
have been different, it ought to be considered no will,
although the general capacity of the testator may be
unimpeached.

Thus, in *Power v. Overholt,*386 the court found that the
testator was operating under an insane delusion when she dis-
herited her niece, a natural object of her bounty, based on the
unjustified belief that the niece had stolen certain silver articles
from her. According to the court:387

In light of this testimony we cannot say that there was
not sufficient evidence from which this jury could find
that the mind of this testatrix was not controlled by an
insane delusion to the detriment of the plaintiff. That
she believed that plaintiff had stolen from her is bey-
ond question under the evidence. That no sane mind
could entertain this belief in view of the circumstances
is too clear for controversy. * * * That this delusion
was a potent factor in her mind when she sought to
dispose of her property by the paper in question would
seem to be plain. * * *

As a result of its findings, the court agreed with the deci-
sion of the lower court and affirmed its holding that the testator
lacked the requisite capacity to execute a will.

When the testator is suffering from Alzheimer’s disease, the
mere existence of the disease “does not establish incompet-
cency to execute a legal instrument” according to the court in *In
re Angle.*388 A testator who is suffering from Alzheimer’s can
have periods of lucidity.389 The question that the court must ask
is whether a period of lucidity occurred at the time the testator
executed the will.390 Furthermore, the court stated that the
opinion of the testator’s doctor on medical incompetency
should not be “given particular weight.”391 This principle
should be followed especially when disinterested parties show
that the testator “was competent and not suffering from a
weakened intellect” at the time of the execution of the will.392
The Angle court relied on the testimony of two disinterested
witnesses, who testified as to the desires of the testator and his
reasons for leaving the property to certain family members,
when determining whether the testator was competent at the
time of the will execution.393 Furthermore, the court looked at
whether the testator’s reason for leaving the property to certain
family members was grounded in reality.394 “It was important
for the court to find that the testator’s statement be factually
correct to establish [his] competence.”395

(3) Procedural and Evidentiary Issues

In Pennsylvania, a presumption of testamentary capacity
arises upon proof that a will has been executed by two sub-
scribing witnesses.396 Courts have reasoned that where a will is
drawn by an attorney and formally executed, “the burden of
proving testamentary incapacity is upon the contestats and
that burden can be sustained only by clear and strong or com-

378 Id.
379 Id.
380 Id.
381 Id.
389 Id.
390 Id.
391 Id.
392 Id.
393 Id.
394 Id.
395 Id.
396 Id.
397 Id.
399 *In re Estate of Stuart,* 307 A.2d 865, 867 (Pa. 1978).

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pelling evidence of lack of testamentary capacity."397 Moreover, the contestant must prove lack of testamentary capacity "in a positive manner [and] not in a doubtful one."398 If the contestant proves a lack of capacity, the propounder of the will must prove that it was executed during a lucid interval.399 Similarly, the courts state that the burden of proving an insane delusion is on the person contesting the will.400

By contrast, where a person is adjudicated a mental incompetent and thereafter executes a will, the burden is shifted to the proponent of the will to show by clear and convincing evidence that the testator possessed capacity at the time of the will's execution.401 The burden of proof that the proponent must satisfy "is a daunting burden...that...can seldom be overcome."402 However, if the burden is satisfied by the proponent, the burden of proof then shifts to the contestant to overcome the presumption.403 The Pennsylvania Supreme Court in Hastings made clear, however, that the presumption of lack of capacity only attaches if an adjudication of lack of capacity precedes the execution of the will, and that an adjudication of mental incompetence shortly after the making of the will does not change the burden.404 In the Hastings case, the testatrix had executed three wills. In the first will, she had left her estate to six beneficiaries, including a nephew, Robert Hastings.405 In the second will, she named her nephew Robert Hastings as the sole beneficiary. Approximately four years after the testatrix executed her second will, Robert Hastings, her nephew, initiated an incompetency proceeding and petitioned the court to appoint him to serve as guardian of the person and of the estate of his aunt. After the petition had been filed but two weeks before the adjudication on incompetency, the testatrix executed a third and final will. The final will reinstated as beneficiaries four of the six beneficiaries from her first will. It excluded one beneficiary who had since died and excluded Robert Hastings, the nephew. The testatrix explained to the drafting attorney that she wanted to disinheret her nephew and that she was angry and upset that he had begun incompetency proceedings against her. The Pennsylvania Supreme Court reasoned that the incompetency adjudication shortly after will execution was properly allowed in as evidence of insanity during the test, but that it did not place the burden of proving capacity onto the will proponent, since it did not precede the will execution.406

Furthermore, the courts will consider evidence that shows that a testator's incapacity within a reasonable time period before and after the execution of the will as an indication that he or she did not possess the requisite mental capacity at the time he or she executed the will.407 Yet, evidence that is closer in time to the execution of the will is preferred by the courts and will be given greater significance in determining the capacity of the testator at the time of execution.408 For example, in Schott,409 the court stated that the testimony of witnesses who saw the alleged incompetency on the day the will was executed is generally superior to the testimony of other witnesses who saw the alleged incompetency before and subsequent to the day the will was executed.410 Additionally, the trial courts are entitled to rely on the testimony of the attorney who handled the execution of the will in determining if the testator was mentally competent at the time the will was executed, notwithstanding the contrary opinion of medical doctors who examined the testator months after the execution of the will.411 The court in Schott differentiated between an adjudication of incapacity and an adjudication of lack of testamentary capacity. An adjudication of incapacity "is aimed at preserving the person and the estate of a person unable, partly or wholly, to manage for himself." An adjudication of lack of testamentary capacity "is aimed at substituting an earlier dispositive scheme (or an intestacy) for the testator's latest will because clear and convincing evidence has been adduced to show that the testator lacked the intelligent knowledge of one or more of the three requirements needed for a testator to possess the requisite mental capacity to execute a will.412

C. Florida

1. In General

The term testamentary capacity has long been defined in Florida as the413 ability of the testator to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed. The courts recognize that a testator may still have capacity to execute a valid will even though he or she may "frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, or [v]acillating judgment." Florida courts require the testator to understand, in a general way, the nature and extent of the property to be disposed of. This element of testamentary capacity requires the testator to have "sufficient capacity to comprehend perfectly the condition of his property."414 The test for capacity requires the testator to understand his or her relation to those who would naturally claim a substantial benefit from the will. This does not, however, mean that the testator cannot disinherit those, such as children, who would naturally claim a substantial benefit from

398 In re Schott Estate, 58 Pa. D. & C. 4th 533 (Pa. Com. Pl. 2001). This standard was reaffirmed in In re Ansley, 777 A.2d 114, 123 (Pa. Super. Ct. 2001), where the court found that the testator did not lack testamentary capacity, even though there was "no doubt" that he was suffering from Alzheimer's disease when he executed his will.
400 London Estate, 32 A.2d 3 (Pa. 1943).
403 Hastings, 387 A.2d at 867.
404 Id. at 867.
405 Id. at 860.
406 Id. at 867.
the will; a testator is well within his or her rights to make an unjust and unnatural will that leaves nothing to his or her children.424 Finally, the Florida test for capacity requires the testator to have a general understanding of the juridical effect of the will as executed. Thus, the testator must know that those not included in his or her will would be excluded from sharing in his or her property after his or her death.425

(2) Lucid Interval and Insane Delusion

A testator’s testamentary capacity is determined at the time he or she executes a will.426 A will can be validly executed by an otherwise questionable testator if it is executed during a lucid interval; it is only critical that the testator possess testamentary capacity at the time of execution of the will. A lucid interval is defined in Florida as “a period of time during which the testator returned to a state of comprehension and possessed actual testamentary capacity.”427 A prime example of a will executed during a “lucid interval” is Skelton v. Davis.428 In Skelton, the testatrix executed a new will only days after she became a ward of the court and a curator was appointed to handle her business affairs.429 In the new will, the testatrix substantially lessened the amount of her devises to two of her daughters, and provided reasons for this change.430 She stated that they had “harassed me recently with litigation ... even going to the extent ... of applying for the appointment of a curator to take charge of my property ... I resent this action on their part as I am not incompetent.”431 Further, there was testimony given that the testatrix had the ability to understand the nature of the instrument, and that she knew the identity of her heirs. The addition of these sentences to her will regarding the mistreatment from her daughters showed that she knew the effects of her will. As a result, the Florida Third District Court of Appeal allowed the second will into probate. A testator who is otherwise able to satisfy the capacity tests may, however, have his or her will, or a provision thereof, stricken if it is the product of an insane delusion. In 1933, the Supreme Court of Florida defined an insane delusion as:432

Any belief which arises from reasoning from a known premise, however imperfect the process may be, or how illogical the conclusion reached, is not an insane delusion . . . . An insane delusion has been defined as a spontaneous conception and acceptance as a fact, of that which has no real existence except in imagination. The conception must be persistently adhered to against all evidence and reason. It has also been defined as a conception originating spontaneously in the mind without evidence of any kind to support it, which can be accounted for on no reasonable hypoth-

424 Hamilton v. Morgan, 112 So. 80, 82 (Fla. 1927).
429 Id.
430 Id.
431 Id. at 434.
432 Hopper v. Sostcz, 145 So. 855 (Fla. 1933).
those findings.” 434 However, the probate court’s finding will be overturned when “the probate judge has misapprehended the evidence as a whole.” 435

d. Colorado

(1) In General

The test for testamentary capacity in Colorado was established in Cunningham v. Stender. 436 In that case, the Supreme Court of Colorado stated that testamentary capacity existed at the time the will was made when the testator: (1) understood the nature of her act; (2) knew the extent of her property; (3) understood the proposed testamentary disposition; (4) knew the natural objects of her bounty; and (5) made a will that represented her wishes. 437 A testator who has the capacity to make a will may “dispose of his property as he pleases,” and “indulge his prejudice against his relations and in favor of strangers.” 438 A testator does not have to know the “actual value of his estate” to have testamentary capacity. Furthermore, “[a] perfect memory is not an element of testamentary capacity [because] a testator may forget the existence of part of his estate . . . and yet make a valid will.” 439 Thus, in Breeden v. Stone, 440 a testator who had used alcohol and cocaine for several years before his death, who suffered from mood swings, and who “worried excessively about threats against his and his dog’s life” had testamentary capacity. The court reached this conclusion, in part, because the testator: “(1) could index the major categories of the property comprising his estate; (2) knew his home and rental addresses; and (3) identified the devisee by name and provided her current address.”

(2) Lucid Intervals and Insane Delusions

Colorado uses the “insane delusion test” to determine if a person possesses the appropriate testamentary capacity when he or she executes a will. 441 The insane delusion test states that “a person lacks testamentary capacity when he suffers from an insane delusion that materially affects his disposition in the will.” 442

When a contestant tries to overcome the prima facie case of testamentary capacity by alleging that the testator executed the will as a result of a delusion, the contestant has the burden of proving that there was a delusion. When proving a delusion, the contestant must prove that the testator “entertained the belief in question, that it was groundless, and was persistently held by her, without justification in fact.” 443 Additionally, the contestant must show that the execution of the will “was without any cause whatever in reason or in fact, but rested wholly on things imagined” because “a delusion is a creation of the imagination . . . that springs up spontaneously in the mind, and which rests on no intrinsic evidence of any kind.” 444

In Breeden, for example, the testator had believed there were listening devices in his home and assassination plots against him and his dog. The Colorado Supreme Court affirmed the probate court’s finding of testamentary capacity because “the insane delusions from which the decedent was suffering did not materially affect or influence his testamentary disposition.” 445

(3) Procedural and Evidentiary Issues

Before 1973, the proponents of a will had the burden of proving that the testator possessed the required testamentary capacity when the will was executed. 446 However, in 1973, the burden was changed and placed upon the contestants of a will. 447 Today, in Colorado, when a proponent “has offered prima facie proof that the will was duly executed, any contestant then assumes the burden of proving a lack of testamentary capacity, including a lack of sound mind, by a preponderance of the evidence.” 448

Furthermore, a contestant may use expert testimony as evidence “regarding a testator’s lack of capacity at a time prior to the execution of the will” and such evidence may support an inference that the testator lacked capacity when the will was executed. 449 However, the probative value of such evidence may be diminished based upon the “amount of time between the events underlying the expert’s opinion and the testator’s execution of the will” that has passed. 450 As the Colorado Supreme Court stated in Hanks v. McNelis Coal Corporation, 451 “clearly manifested symptoms of senile dementia before a will was made . . . is held not conclusive of incapacity to make a will.”

B. Undue Influence

1. In General

While undue influence and lack of testamentary capacity are distinct concepts, as a practical matter they overlap. For example, a testator’s weakened physical or mental condition, an issue at the core of lack of capacity cases, is also relevant to an analysis of whether a testator could have been unduly influenced. On the other hand, undue influence can invalidate a will executed by a testator who otherwise had the requisite capacity. The theory underlying undue influence is that the influence was so great it overcame the testator’s free will, substituting the wishes of another. Note that influence of a generalized nature is not enough; a will is invalidated only if the influence was directed toward the formation of the will.

One issue affecting challenges based on undue influence is which party (the contestant of the will or the proponent of the will) has the burden of proof. Related to the question of who
has the burden is what standard must be satisfied. In some states, the standard is a preponderance of the evidence; other states require clear and convincing evidence. A second important issue is what procedural presumptions, if any, the jurisdiction may have in place. Direct proof is a rare commodity in undue influence cases, and most jurisdictions have developed procedural presumptions that could affect the outcome.

a. Presumptions

The factors that give rise to a procedural presumption in favor of the contestant are phrased differently in the different jurisdictions. Some jurisdictions, such as Florida, find that a presumption of undue influence arises if the contestant proves that the beneficiary (proponent) was (1) a "substantial beneficiary"; (2) in a "confidential relationship" with the testator; and (3) "active in procuring" the will. Arizona has a three-prong test that is virtually identical to Florida's for the presumption of undue influence to arise. In Arizona, the presumption arises where a person: (1) occupies a confidential relationship with the testator; (2) actively procures or prepares the execution of the will; and (3) is a principal beneficiary.42

Other jurisdictions have framed the elements for an undue influence presumption slightly differently. In Kansas, for example, a presumption of undue influence arises if: (1) the beneficiary and the decedent were in a "confidential relationship"; and (2) "suspicious circumstances" are demonstrated by clear, satisfactory, and convincing evidence.43 Each state's particular rules would have to be analyzed very carefully to determine if a presumption could be raised.

While the elements required for a will contestant to obtain a presumption of undue influence vary from state to state, one element that is often required is a "confidential relationship" between the alleged undue influencer and the testator. Several relationships are almost always, confidential in nature; they are: guardian and ward; trustee and beneficiary; agent and principal; attorney and client; and pastor and patient.44 Other examples of relationships that have been deemed confidential, based upon each of their surrounding circumstances, are: bank employee and bank customer; and hospice volunteer and elderly patient.45

In addition, confidential relationships are not limited to normal fiduciary relationships, but "may also arise informally from moral, social, domestic, or purely personal relationships.46 They may be evident in relationships "of blood, business, friendship, or association in which one...party repose special trust and confidence in the other who is in a position to have and exercise influence over the first party.47"

On the other hand, a friendship or a close family relationship alone is typically not enough for the relationship to be deemed confidential. In Brown v. Aitkensworth,48 the court found that a friend who had been conveyed property by the decedent did not have a confidential relationship with the decedent, although the friend and the decedent enjoyed a close friendship. The friend did not provide the decedent with medical care, did not share joint accounts with the decedent, and did not enjoy the power of attorney. Furthermore, there was no evidence that the decedent's mental and physical problems prevented him from making his own decisions or running his own life to the point where it would have been easy for another person to exert control.

Similarly, a parent and child relationship, alone, generally does not constitute a confidential relationship. Where close family relationships are involved, typically proof of the additional elements of dominion and control would be necessary to give rise to the presumption of undue influence.49 A family member who gives financial advice to the testator or who financially handles the testator's money may be found to have a confidential relationship with that family member.50 Also, in Virginia, family members who are involved in an attorney and client relationship could be deemed involved in a confidential relationship.

Some family relationships, however, even coupled with other factors such as control of the testator's finances may not be deemed to be "confidential relationships. Spousal relationships are generally not considered confidential or fiduciary in nature for purposes of determining whether undue influence was exerted. In Florida, for example, a "confidential relationship" cannot be found if the alleged influencer is the spouse of the testator. In Tursagin v. Wu,51 the court explained that if the "confidential relationship between spouses were not exempted from that presumption of undue influence rule, the presumption would arise in nearly every case in which the spouse is a substantial beneficiary, since the required active procurement would almost always be present. Since a "confidential relationship" is a necessary element for the presumption of undue influence to arise in Florida, when the alleged influencer is the spouse of the testator, undue influence must be proved directly rather than by use of the presumption.52

Michigan similarly finds that because "[m]arriage...is a unique relationship, treated in law differently from other rela-

42 In re Estate of Shannon, 9 P.3d 1062, 1067 (Ala. 2000).
43 In re Estate of Farr, 49 P.3d 415, 430 (Kan. 2002).
44 Music v. Clarke, 733 A.2d 4 (Md. 2000) (taking attorney-client and trustor-beneficiary relationships are presumed confidential by a matter of law); Meier v. Wright, 84 N.E.2d 57, 60 (Ind. Ct. App. 2000) (finding examples of confidential relationships are those of attorney and client, guardian and ward, principal and agent, pastor and parishioner, and parent and child).
45 See Estate of Arnold, 479 N.Y.S.2d 924 (N.Y. Sur. Ct. 1983) (holding confidential relationships subject to judicial scrutiny include attorney- client, patient-physician, patient-nurse, clerist-parishioner, and those who oversee day to day needs of aged in facilities for their care).
46 See Owens v. Meurer, 847 A.2d 700 (Pa. Super Ct. 2004). Two bank employees were found to have engaged in a confidential relationship with bank customer who opened account and named the bank employees as sole beneficiaries of such account, supporting a finding of undue influence, the customer deeply trusted in and relied on the bank employees, signing a document indicating that he wished to put his account in trust to bank employees, and allowing bank employees to hold the account passbook.
47 See Mardian v. Rhodes, 626 So. 2d 608 (Miss. 1993).
49 14 P.3d 1088 (Kan. 2000).
50 245 So. 2d 757 (Miss. Ct. App. 2006).
51 245 So. 2d 757 (Miss. Ct. App. 2006).
52 Moulton v. Simpson, 305 S.W.2d 386, 385-86 (Tex. 1955).
55 Id.
56 However, under Florida Statute § 732.805, if a surviving spouse "is
found to have procured a marriage" by "fraud, duress or undue influence," the spouse is not entitled to immunity from the presumption of undue influence that the surviving spouse may otherwise have under Florida law.

40 Id.

41 id. The court mentioned that it could be possible for a spouse to assert "undue influence over a weakened or vulnerable spouse," under different circumstances. Id. at 797, n. 4.


43 Id.

44 Id.


46 Id. at 1037.

In a Tennessee case, Estate of Glasgow v. Whitman,480 the testator left all of her estate to her daughter and named her son-in-law, the husband of the sole beneficiary, the executor of her estate. This was done to the exclusion of her six other children and stepchildren. The siblings contested the will, alleging that the will had been procured by the executor's undue influence. The sole beneficiary and her husband, the executor, argued that in order to invalidate the will, the daughter beneficiary would have had to have had undue influence over the testator. The court disagreed reasoning that whether undue influence is exercised directly or indirectly (by a third person) is immaterial; what is relevant is whether the testator has been induced by various means to execute an instrument that reflects the will of another instead of his or her own. Thus, a beneficiary does not have to be the one who exerts undue influence over the testator. The fact that the executor, and not the beneficiary, exerted undue influence did not preclude a claim of undue influence.481

478 Id.


483 Id. at 31.
In a Georgia case, Harper v. Harper,483 the testator de- 
vised his entire estate to only one of his surviving sons. One of 
the disinherited sons contested the will, claiming that the son of 
the beneficiary (a grandson of the testator) had fraudulently 
encouraged the testator by leading him to believe that the contestant 
had stolen a large amount of money from the testator, which 
were buried in his yard. Upon hearing from his grandson 
that the contestant had purchased numerous tractor-trailers, 
the testator concluded that the contestant stole the money. He 
therefore rewrote his will to reflect the dishonesty. The Superior 
Court of Georgia granted summary judgment in favor of 
the will beneficiary. Thereafter, the contestant appealed the 
order to the Supreme Court of Georgia. The Georgia Supreme 
Court revisited the lower court’s decision, stating that the lower 
court’s finding, that the contestant could only prevail on a claim 
of undue influence if the beneficiary himself was the one to 
unduly influence the testator, was incorrect. The Georgia Su-
preme Court held that a will is invalid if anything destroys 
the testator’s will and substitutes the will of another in the place 
of the testator’s will. The court stressed:484

there is no express statutory requirement that the in-
validating fraud or undue influence be directly attrib-
utable to the beneficiary . . . The general rule is that 
[t]here is no restriction as to those who may be shown 
to have exercised undue influence on a testator . . . 
The undue influence in the execution of a will which 
will invalidate it may be that of a third person, as well 
as of a beneficiary . . . [T]he absence of volition on the 
part of the testator means absence without refer-
ence to whether or not the party who influenced 
him benefits by the will or is the agent of a beneficiary . . . 
A will may be invalidated because of undue influence 
of which the beneficiary was entirely ignorant.

The Harper court concluded that summary judgment 
would have been proper if there was no question of material 
facts as to whether the beneficiary or his son had exerted undue 
influence over the testator.

b. Effect of Presumption on Burden of Proof

More important perhaps than the existence of a presump-
tion is its effect. In some states, a presumption of undue influ-
ence, once raised, transfers the burden of proof onto the prop-
ponent of the will. Shifting the burden of proof effectively 
requires the proponent to prove that the will was not the 
product of undue influence. In other states, however, once the 
preparation of undue influence is raised, only the burden of 
going forward with evidence shifts to the proponent of the will; 
the contestant retains the burden of proof. The proponent, who 
has the burden of going forward, would have to introduce 
evidence to explain his or her relationship to the testator and his 
or her involvement with the will.485 If the proponent does not 
introduce any evidence to rebut the presumption, the contestant 
wins. If, however, the proponent can introduce evidence 
to explain his or her actions, the presumption disappears. 
The factors that gave rise to the presumption remain, however, and 
can be used by the fact finder to determine if the contestant 
satisfied his or her burden of proof. As a practical matter, the 
burden of going forward with evidence will be satisfied when 
the beneficiary (proponent) comes forward with a reasonable 
explanation for his or her active role in the decedent’s affairs. 
The precise nature of the explanation will vary, depending on 
the facts giving rise to the presumption. Generally, the trial 
judge must decide whether the beneficiary’s explanation is suf-
ficient to rebut the presumption. When the burden is satisfied, 
the presumption vanishes, and the trial judge decides the case 
based on the weight of the evidence (or a higher standard where 
applicable), without regard to the presumption.486

The policy reason given for shifting the burden of proof 
to the proponent is that the law should not permit testamentary 
dispositions that are the consequence of coercion.487 This 
position is buttressed by the existence of an aging yet mobile 
population. The argument runs that in many instances — due to 
illness, death of a spouse, or isolation from extended families 
because of increased mobility — the elderly are vulnerable to 
improper influence in testamentary dispositions.488

The policy reason most often cited for leaving the burden of 
proof with the contestant (and shifting to the proponent only 
the burden of going forward with evidence) is testamentary 
freedom.489 If the burden of proof (as opposed to the burden of 
going forward) is shifted, the ability of a testator to devise 
freely his or her property in any way he or she desires would be 
seriously hampered. This is especially true where the presump-
tion of undue influence is a rather easy one to raise in the 
particular jurisdiction. Thus, the easier the presumption is to 
raise, the stronger the argument for not shifting the burden of 
proof, for fear that the presumption becomes virtually conclu-
sive.490 The argument is also made that shifting the burden 
of going forward with evidence serves as a procedural device 
that can assist the fact finder in determining the issue of undue 
influence. By forcing the proponent (i.e., the person accused of 
unduly influencing the testator) to come forward and explain 
his or her behavior, the burden of going forward serves to 
enhance the likelihood that all the relevant facts surrounding 
will execution will be heard by the trier of fact. In many cases, 
when the burden of going forward shifts to the proponent, he or 
she is required to take the stand or otherwise introduce evi-
dence to provide a reasonable explanation for his or her actions.491

483 Id.

484 Id. at 456 (quoting 79 Am. Jur. 2d. With § 94).

of Undue Influence: Does it Change the Law or Merely Clarify?” 77 Fla. L. Rev. 2 J. 20, 24 (Feb. 2003).

486 Id. at 456 (quoting 79 Am. Jur. 2d. With § 94).

487 Id. at 456 (quoting 79 Am. Jur. 2d. With § 94).

of Undue Influence: Does it Change the Law or Merely Clarify?” 77 Fla. L. Rev. 2 J. 20, 24 (Feb. 2003).

489 Id.

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destroyed and a will is produced that reflects the volition not of the testator, but of the person exerting undue influence. 494 In Florida, to establish undue influence directly, the contestant of the will must establish that: (1) influence was exerted against the testator; (2) the effect of the influence was to destroy the mind and free agency of the testator; and (3) the product was a will (or will provision) that would not have been executed if not for the influence exerted on the testator. In other words, the document was the product of the volition of someone other than the testator.

(1) Raising the Presumption of Undue Influence in Florida

Florida courts recognize the difficulty of proving undue influence directly. As a result, Florida recognizes a procedural presumption in favor of undue influence. The primary case in the area is In re Estate of Carpenter, 495 in which the Florida Supreme Court explained that in order for a contestant to obtain a presumption of undue influence, he or she must prove that the beneficiary: (1) was a substantial beneficiary; (2) who occupied a confidential relationship with the testator; and (3) was active in procuring the will. 496 All three parts of the test must be satisfied or the presumption does not arise.

(a) Substantial Beneficiary

Of the three prongs necessary for raising the presumption of undue influence, the least guidance is available for the term "substantial beneficiary," in part because the issue is often not a close call. For example, in the leading Florida case on undue influence, In re Estate of Carpenter, 496 there was very little question that the testatrix's daughter, one of four offspring but essentially the sole beneficiary, was a "substantial beneficiary." There were no previous wills, or other extraneous circumstances that would tend to explain this disproportionate distribution. 497 Thus, while the other two prongs necessary for raising a presumption of undue influence (i.e., confidential relationship and active procurement) were discussed at length, the Carpenter court had little difficulty concluding that the sole beneficiary in that case was a "substantial beneficiary."

Under different facts, the "substantial beneficiary" prong could very much be at issue. Usually a substantial beneficiary is thought of as someone who received a "substantial" and "natural" distribution. An unnatural distribution could be found, for example, if it is significantly more than the person would have received under intestacy, in comparison to others in the same degree of relationship to the testator, or if it is more than that provided for the beneficiary in previous wills.

The "substantial beneficiary" prong was at issue in Carter v. Carter. 498 In that case, the appellate court reversed the trial judge's decision that the testatrix's will had been the product of undue influence by two of her three sons. 499 The essential facts are as follows. The testatrix had executed three wills. The first will, executed in 1971, divided her estate equally among her three sons. The second will was executed in 1975, shortly after the divorce of one of her sons, Carl, from his wife, Virginia. In the second will, the testatrix eliminated Carl's one-third share and divided that one-third equally among Carl, his former wife, Virginia, and the couple's four children. 500 The third and final will was executed eight years later in 1983, almost two years before the testatrix's death. In the 1983 will, the testatrix returned to the disposition (one-third each to her three sons) of the original 1971 will. 501 Virginia (Carl's former wife) and one of Carl's sons contested probate of the 1983 will, claiming that it was the product of undue influence exerted by Carl and his brother James on their mother, the testatrix.

In analyzing the "substantial beneficiary" requirement, the appellate court in Carter reasoned that James could not possibly be a substantial beneficiary because he "received the same one-third share under all three wills the testatrix executed."

The court also stated, that "it is arguable that Carl did become a substantial beneficiary," but found that fact not to be determinative, since the two brothers' actions in executing the will were "perfunctory physical activities" that did not amount to "active procurement." 503 The Carter case is instructive, in that the rationale given for James clearly not being a "substantial beneficiary" was the identical dispositions for him in the two earlier wills, rather than the fact that he would have received the same distribution had the assets passed under intestacy. 504 Similarly, the Carter court's suggestion that Carl was perhaps a substantial beneficiary because he previously had received less in an earlier will is instructive, because Carl too would have received the same under intestacy as under the contested will. This case highlights the importance of reviewing carefully all prior wills of the testator for similar or disparate distribution schemes.

The Carter court also alluded to, but did not address directly, the issue of third-party undue influence creating "substantial beneficiary" status. The contestants of the will in Carter had argued that even if one of the beneficiaries, James, was not technically a "substantial beneficiary," his actions in procuring the will to favor another person, his brother, Carl, amounted to undue influence. 505 The Carter court skirted the issue of third-party undue influence by noting that it found that the beneficiaries had not actively procured the will.

(b) Confidential Relationship

Fiduciary relationships such as attorney/client, priest/penitent, guardian/ward, or trustee/beneficiary are almost invariably found to constitute "confidential relationships." The more difficult analysis is in the relationship is not a fiduciary relationship commonly acknowledged by the law. Florida has adopted a fairly broad reading of the term "confidential

495 253 So. 2d 697 (Fla. 1971).
496 Id.
497 Id.
498 Id. at 699-700.
500 Id.
501 Id.
502 Id. at 142.
503 Id.
504 Id.
505 Id.
Detailed Analysis

relationship.” The classic formulation of “confidential relationship” was stated by the Florida Supreme Court in the seminal case of In re Estate of Carpenter.\textsuperscript{203} The Carpenter court (citing an earlier decision) stated that the term “confidential relationship” is a very broad one that embraces both technical fiduciary relations and informal relations that exist whenever one person trusts and relies upon another.\textsuperscript{204} The court noted that the relations “may be moral, social, domestic, or merely personal.”\textsuperscript{205} The Carpenter court then applied the broad “trust and reliance” definition for “confidential relationship” to the facts of that case and found that a confidential relationship existed between the beneficiary and the testatrix.\textsuperscript{206} The factors in favor of finding a confidential relationship in Carpenter were that the beneficiary and the testatrix had a mother/daughter relationship; that they were very closely emotionally tied; and that the testatrix had allowed the beneficiary daughter to admit her into a hospital. On the other hand, there was no evidence that the daughter/beneficiary was the testatrix’s financial consultant or in any way in charge of the testatrix’s financial affairs. Thus, it appears that Florida finds confidential relationships fairly easily. In other jurisdictions, a finding of a confidential relationship, absent a technical fiduciary relationship, would require not just a finding of trust and reliance but also something more, such as perhaps proof that the beneficiary had handled the decedent’s finances.

An important caveat to the broad reading of “confidential relationship” in Florida is that a confidential relationship cannot be found if the alleged influencing person is the spouse of the testator.\textsuperscript{207}

(c) Active Procurement

The Florida Supreme Court in In re Estate of Carpenter\textsuperscript{208} provided a list of the seven elements that tend to show that the beneficiary was active in procuring the contested will:

\begin{itemize}
  \item presence of the beneficiary at the execution ceremony;
  \item presence of the beneficiary on occasions when the testator expressed a desire to make a will;
  \item the beneficiary’s recommendation of the attorney who makes the will;
  \item the beneficiary’s knowledge of the purported contents of the will before its execution;
  \item giving of instructions by the beneficiary to the attorney on preparation of the will;
  \item beneficiary securing the witnesses for the will; and
  \item the beneficiary’s safekeeping of the will.
\end{itemize}

The Carpenter court makes clear that the contestant does not have to prove all of the factors, but that the presence of some of the factors demonstrates active procurement. The more factors present in a given situation, the greater the likelihood that a court will find that the beneficiary engaged in active procurement.

The “active procurement” element proved determinative in Raimi v. Farlong,\textsuperscript{209} a decision instructive as to how the factors of active procurement are interpreted. The essential facts of Raimi are as follows. The testatrix in Raimi, a widow who had no children, had executed several wills during the last years of her life. Two of those wills, including her final will, favored a nephew of the testatrix. An earlier will favored the stepdaughter of the testatrix. At her death, the testatrix’s nephew filed for the administration of his aunt’s final will.\textsuperscript{210} The final will in effect excluded the testator’s stepdaughter and left the bulk of the testatrix’s estate to her nephew. In response, the stepdaughter sought to set aside the final will, claiming it was the product of undue influence by the nephew, and instead have admitted to probate an earlier will that favored her.\textsuperscript{211} The lower court agreed with the stepdaughter that the final will was the product of undue influence by the nephew. The lower court found that there was undue influence on the part of the nephew because of his “role in procuring [the will]; [his] role in procuring [the will]; and [his] control of the decedent’s personal and financial affairs.”\textsuperscript{212}

In reversing the lower court, the Florida Third District Court of Appeal reviewed whether the stepdaughter/contestant had satisfied the three-factor test for a presumption of undue influence, by showing that the nephew: (1) was a substantial beneficiary; (2) was in a confidential relationship with the testatrix; and (3) had actively procured the will. The appellate court agreed with the trial court that the elements of substantial beneficiary and confidential relationship had been satisfied in the case.\textsuperscript{213} When, however, the appellate court applied the elements for active procurement set forth in Carpenter,\textsuperscript{214} it found the evidence on the record was insufficient to support a finding of active procurement.

In applying the factors for active procurement to the final will, the appellate court conceded that the nephew was present when the testatrix expressed an interest in making the final will.\textsuperscript{215} However, the court stated that the nephew did not obtain the attorney for the transaction. Rather, the appellate court noted, the testimony showed that the attorney for the final will was selected at random from the yellow pages. Further, the nephew did not give any instructions to that attorney regarding the final will, and there was no evidence that he had any knowledge of the will’s contents.\textsuperscript{216} In addition, the nephew was not in the office with the attorney and the testatrix when the final will was executed and did not procure any of the witnesses. Finally, the court stated that the nephew “did not see or take possession of” the will after its execution.\textsuperscript{217} Since active procurement is a requisite element for the presumption of

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undue influence, the appellate court reasoned that the step-daughter/contestant was not entitled to the presumption of undue influence.510

In an important footnote in Raiser, the appellate court noted that the lower court had apparently justified applying the presumption of undue influence to the final will because of the proponent/nephew’s activities with respect to an earlier will that favored the nephew.511 The appellate court concluded, however, that active procurement of an earlier will “was wholly irrelevant to the question of whether [the subsequent final will was] also the product of undue influence.”512

Practice Comment: The active procurement prong provides the area where the drafting attorney may be most helpful in avoiding the appearance of undue influence. Attorneys in Florida must memorize the “seven deadly sins” that suggest active procurement, and be vigilant in avoiding them. With regard to factor one (beneficiary’s presence during execution) and factor six (beneficiary securing the witnesses) the attorney has control. Under no circumstances should the beneficiary be in the room during the execution ceremony or be involved in securing the witnesses. The attorney can also assist in defining factors two (presence of beneficiary on those occasions when testator expressed desire to make a will); four (knowledge of the purported contents of the will before its execution) and five (giving instructions on the will by the beneficiary to the attorney), by ensuring that whenever the testator meets with the drafting attorney, the beneficiary is not present, and by avoiding any discussions of the will, its contents, or the execution thereof with the beneficiary. With regard to factor seven (safekeeping of the will by the beneficiary), the attorney should at least inform the testator that such an action would be prejudicial to the beneficiary in a later will contest. Factor three (recommendation by the beneficiary of the attorney to draft the will) is not only troublesome for a possible contest but also raises the specter of ethical issues. Attorneys with questions regarding possible undue influence should read IV, below, regarding will contests, and particularly take note of the ethical discussions therein.

(2) Effect of Undue Influence Presumption in Florida

In Florida, once the presumption of undue influence is raised (i.e., the contestant has shown that the proponent is a substantial beneficiary, was in a confidential relationship with the testator, and was active in procuring the will), the burden of proof shifts from the contestant to the proponent. Fla. Stat. § 733.107 provides:

Burden of proof in contests; Presumption of undue influence
(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation sought.
(2) The presumption of undue influence implements public policy against abuse of fiduciary or confidential

relationships and is therefore a presumption shifting the burden of proof.

Fla. Stat. § 732.5165 provides that a will, or any part of it, is void if procured by fraud, duress, undue influence, or mistake.513

b. Wisconsin

There are two avenues by which a contestant challenging a will on the basis of undue influence may prevail in Wisconsin. One is by proving directly the elements that show undue influence. Those elements are: (1) susceptibility to undue influence; (2) opportunity to influence; (3) disposition to influence; and (4) coerced result.514 The burden is on the contestant to prove by clear, satisfactory, and convincing evidence that the will was the result of undue influence. However, when three of the four direct elements have been established by clear and convincing evidence, only slight evidence of the fourth is required. The second method of challenge is to prove the existence of: (1) a confidential relationship between the testator and the favored beneficiary; and (2) suspicious circumstances surrounding the making of the will. Under this method, when a contestant proves the existence of both elements, a presumption of undue influence is raised, which must be rebutted by the will proponent.514 Under either method, proof of undue influence typically rests on circumstantial evidence.

(1) Using the Four-Factor Direct Method to Demonstrate Undue Influence in Wisconsin
(a) Susceptibility to Undue Influence

A factor that suggests that the testator may have been unduly influenced in executing his or her will is the testator’s “susceptibility” to undue influence. In examining this factor, the Supreme Court of Wisconsin, in Estate of Kamesar v. Kamesar,515 stated that the facts to be considered are the testator’s: (1) age; (2) personality; (3) physical and mental health; and (4) ability to handle financial affairs. Applying those facts to the testator in Kamesar, the court concluded that there was evidence that the testator suffered from arteriosclerosis, and that during the month of execution, the testator was forgetful and confused.516 On the other hand, the court noted that almost all the witnesses testified that the testator was of sound mind at the time of his marriage, which was just three months before executing the will. The court also made note of the fact that the testator was aware enough to ask for a prenuptial agreement just three months before the will’s execution. In addition, the court noted that the attorney who drafted the will in question was present when all four of the testator’s wills were executed. Furthermore, the drafting attorney testified that when the will in question was executed, he believed that the testator was of sound mind and was not under any undue influence.517 Bolstering the attorney’s testimony was evidence that during the execution ceremony, the testator was aware

510 Id.
511 Id. at n. 13.
512 Id.
513 359 N.W.2d 733 (Wis. 1977).
514 Id.
515 259 N.W.2d 733 (Wis. 1977).
516 Id. at 737.
517 Id.
enough to request a change in the will with regard to his wife's occupancy of an apartment in the event of his death. The court reasoned that this request showed the testator's awareness of the will's provisions. The court also found relevant the testimony of the testator's wife that the testator never forgot what he owned or who his children were.528 On balance, the Kemesar court determined that the contestants did not establish susceptibility.529

Three years after Kemesar, the Wisconsin Supreme Court in Estate of Dejmali v. Mertz530 again analyzed whether a testator was "susceptible" to undue influence by examining the testator's: (1) age; (2) personality; (3) physical and mental health; and (4) ability to handle financial affairs. The Dejmali court explained that the susceptibility element is established when those four factors demonstrate that the testator was "unusually receptive to suggestions of others and consistently deferred to them on matters of utmost personal importance."531 The testatrix in Dejmali,532 Julia Dejmali, was a widow whose only child had died a bachelor without issue. Shortly after the death of her son, the testatrix, during a hospital stay, executed a will that devised her entire estate to one niece and that niece's husband. Siblings of the testatrix, other nieces, and a nephew objected to probating the will, alleging that it had been the product of undue influence by the niece.

The Dejmali court applied each of the four factors for assessing "susceptibility" to influence.533 In examining the first factor, the significance of her age, the court stated that while it was true that at the time of the will execution, the testatrix was 76 years old, there was no evidence introduced that the testatrix's faculties were affected by her age. The court also noted that the testatrix lived for four years after executing her will. Accordingly, the court reasoned that "the fact that she was seventy-six years old at the time the will was executed is of little significance."534

With regard to the second factor, the testatrix's strength of personality, the testimony was conflicting. The only evidence that the testatrix had a weak personality (which would tend to show susceptibility) was the testimony of a legal secretary who worked in the office of the testatrix's long-time family attorney. The legal secretary testified that, before the deaths of the testatrix's husband and son, the testatrix would accompany them to their attorney's office but would always defer to them on business issues.535 The court noted that the legal secretary's testimony was sharply contradicted by testimony of the secretary's employer, the testatrix's long-time attorney.536 The attorney testified that the testatrix was "strong-willed in the sense that she knew what she wanted and she set out to get it, and while she appeared quiet, when she made up her mind it was exceedingly difficult to change it or to influence her in any way."537

The third factor tending to show susceptibility to influence is the testatrix's physical and mental health. With regard to the testatrix's physical health, the Dejmali court reasoned that, while the testatrix was in the hospital at the time that the will was executed, her hospitalization was due only to some construction in her lungs. The court further noted that the testatrix was well enough to be found standing in her hospital room by one of the testifying witnesses. Accordingly, the court determined that "it seems doubtful that [her] physical condition was so severe as to significantly affect her ability to freely decide for herself."538 The only evidence introduced with regard to the testatrix's mental health was that shortly before the will was executed, the testatrix's son had died. The court reasoned that even though the testatrix may have been grieving the loss of her son three months earlier, that alone "does not demonstrate a lack of mental health."539

The final factor used to analyze susceptibility to influence is the testatrix's ability to handle financial affairs. In Dejmali, the long-time attorney for the testatrix testified that she "understood the financial affairs of her family and took charge of them following the death of her son."540 In addition, the court noted that only two weeks before executing her will, the testatrix had been appointed the personal representative of her son's estate. Thus, the court did not find that the contestants had demonstrated that the testatrix was incapable of handling her financial affairs.541

After reviewing the four factors suggesting susceptibility, the Dejmali court concluded that the only non-controverted fact supporting susceptibility was the testatrix's advanced age at the time of will execution. Since the court gave little weight to the testatrix's age alone, the court found that the susceptibility element was not satisfied.

(b) Opportunity to Influence

This element is found when the beneficiary has had sufficient opportunity to influence the susceptible testator or testatrix into making the improper devise. Opportunity to influence requires examining both the relationship between the testator and the alleged influencing person and the time that the beneficiary spent with the testator.542 This element may be satisfied when there is evidence that the testator and the beneficiary had a close relationship, the testator and the beneficiary spent considerable time together around the time of will execution, and the testator was isolated from others. In Estate of Kemesar v. Kemesar,543 the will proponent/beneficiary had spent significant time with the testator and was the agent under his power of attorney. Accordingly, the proponent in that case conceded that there had been ample opportunity to exert undue influence on...
the decedent. Similarly, in Estate of Dejmak v. Merva, there was evidence that the testatrix was visited by the niece/will proponent almost daily, from the date the testatrix’s son died until the will was executed, and that the niece /proponent drove the testatrix to her attorney’s office. Thus, the Dependant court determined, on reviewing the lower court record, that “a finding that [the proponent of the will] lacked the opportunity to unduly influence [the testatrix] would have been so contrary to the evidence as to require the reviewing court to reject it.”

(c) Disposition to Influence

The Wisconsin courts have explained that disposition to unduly influence means more than the beneficiary having a desire to obtain a share of the estate. This element is described as involving “grasping and overreaching, and a willingness to do something wrong or unfair” on the part of the beneficiary.

(d) Coveted Result

A coveted result is found when a “person has, for no apparent reason, been favored in the will to the exclusion of a natural object of the testator’s bounty.” This is a facts and circumstances analysis. The facts that have been considered in Wisconsin cases to determine coveted result include: (1) the relationship between the testator and the beneficiary in comparison to the relationship between the testator and those contesting the will; (2) whether the contestants were included in any previous will of the testator; (3) whether the testator explained why he or she was excluding the contestants; (4) the relative wealth of the beneficiary to that of the contestants; and (5) the unexpectedness of the testamentary provisions.

(2) Using the Two-Factor Method to Obtain a Presumption of Undue Influence in Wisconsin

The method to challenge a will on the grounds of undue influence in Wisconsin is to establish that: (1) a confidential relationship existed between the testator and the favored beneficiary; and (2) suspicious circumstances surrounded the making of the will. It is the proponent who must establish both of those elements, a rebuttable presumption of undue influence is raised, and the burden of going forward with the evidence to rebut the presumption shifts to the proponent.

(a) Confidential Relationship

When the relationship between the beneficiary and the testator is imbued with a fiduciary character, such as attorney and client, physician and patient, or priest and parishioner, the relationship is found to be “confidential.” In cases where the beneficiary is not in one of those relationships, finding a confidential relationship is more involved. In Estate of Kamear v.

Kamear, the Wisconsin Supreme Court stated that it was hesitant to find a confidential relationship in a family relationship.

The court allowed, however, that a confidential relationship would exist if a testator depends upon the advice of the confidant regarding the subject matter of the will. In addition, the Kamear court reasoned that a family relationship could be a confidential relationship if the relationship of the testator and the favored beneficiary was a close one and if the beneficiary controlled the testator’s finances. In that case, the beneficiary under the disputed will was a daughter of the testator who held his power of attorney and handled his financial affairs. Accordingly, the court found that the element of confidential relationship had been satisfied.

(b) Suspicous Circumstances

Generally, this element is satisfied by: (1) showing that the beneficiary was active “in procuring the drafting and execution of the will”; or (2) by “a sudden and unexplained change in the attitude of the testator.” Facts that tend to show the beneficiary was active in procuring the drafting and execution of the will include the beneficiary hiring or suggesting the drafting attorney; the beneficiary procuring witnesses or otherwise being involved in the execution ceremony; and the beneficiary being present during discussions with the drafting attorney regarding the will. In determining whether there was a “sudden and unexplained change” in the attitude of the testator, the courts examine the naturalness of the will. The will provisions could be deemed natural by taking into account explanations for what, at first blush, may seem an unnatural distribution. For example, in Estate of Kamear, the testator favored one of his children over his other children in the will. However, the will explained that the testator believed that he had adequately provided for his son and his other daughter during their lifetimes, and that the beneficiary daughter had not received similar lifetime gifts. In light of the explanation, the unequal treatment of the children was not found to be unnatural.

c. Kentucky

The Supreme Court of Kentucky analyzed undue influence in Why v. Mantilly. In that case, the testator had executed three wills. The first will left his entire estate to his wife. In the event his wife did not survive him, the will left the testator’s real property to his cousin and his personal property to his brother-in-law. The testator’s wife passed away several months later; thereafter, the testator hired a housekeeper (Ms. Bye). After only several months of working for the testator, the housekeeper accompanied him to draft a new will (the “second will”), in which he left basically everything to the housekeeper.

Shortly after the housekeeper moved in with the testator, the beneficiaries of the first will became concerned with the testator’s behavior and sought to appoint a guardian for him. The district court appointed the testator’s brother-in-law as his limited guardian. Shortly thereafter, the testator was diagnosed

553 259 N.W.2d 733 (Wisc. 1977).
555 Estate of L. W. 245 (Ky. 1998).
556 Id. at 454.
557 The entire estate, save $100, was devised in the will to Ms. Bye. Id.

as suffering from Alzheimer’s disease. After this diagnosis, a petition seeking permission for the marriage of the testator to his housekeeper was submitted to the district court.537 A hearing was held, in which it was determined that the testator was misled by the petition. Although the testator did sign it, it was clear that he did not know it was asking for permission to marry. The testator, during the hearing about the marriage petition, stated that he did not want to marry the housekeeper and in fact was frightened of her. The petition was denied and the housekeeper was terminated soon after.538

The testator executed a third and final will five months after the hearing on the petition for marriage (the “final will”). The final will provisions served to re-enact the provisions of the first will, which disposed of his real property to his cousin and his personal property to his brother-in-law. His cousin drove the testator to the attorney’s office, but did not participate in any of the discussions regarding the will or in the execution of the final will. Almost a year later, the testator died and his brother-in-law was appointed executor of his estate.539 The housekeeper challenged the final will on the grounds of undue influence and lack of testamentary capacity and moved to probate the second will in her favor.540

The court explained that in Kentucky undue influence is considered to be “a level of persuasion which destroys the testator’s free will and replaces it with the desires of the influencer.”541 Thus, the influence must be “of a level that vitiates the testator’s own free will,” so that the testator is disposing of his or her property in a manner that he or she would otherwise refuse to do. At the root of this inquiry, said the court, is whether the testator is exercising his own judgment. In addition, one who contests the will on the basis of undue influence must also show that the influence was made during the execution of the will.542 Mere opportunity is not sufficient in itself to establish undue influence.543

(1) Badges of Undue Influence in Kentucky

The Bye v. Mattingly544 court explained that in determining whether a will “reflects the wishes of the testator,” the court must examine the indicia or “badges of undue influence.” They are as follows:545

- a physically weak and mentally impaired testator;
- a will that is unnatural in its provisions;
- a recently developed and comparatively short period of close relationship between the testator and principal beneficiary;
- participation by the principal beneficiary in the making of the will;
- safecoping of the will by the principal beneficiary;
- efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his or her bounty; and
- absolute control of testator’s business.

The Bye court applied the badges of undue influence to the facts and found that only two of the badges were present. Since the will was executed after a guardian had been appointed for the testator, the court found that the testator was physically and mentally weak. In addition, the court noted that the last badge was satisfied, since the testator’s brother-in-law, as his guardian, had complete control over the testator’s business.546 The court determined, however, that none of the other indicia of undue influence were present. In this case, the final will reinstated the provisions of the testator’s first will and disposed of the testator’s property to two persons with long-standing relationships with the testator (his cousin and brother-in-law). Except for the cousin driving the testator to the attorney for will execution, the beneficiaries were not involved in the execution or preparation of the will. Accordingly, the Kentucky Supreme Court declared that the final will was not the product of undue influence.547

(2) Presumption of Undue Influence in Kentucky

When a contestant to a will claims that undue influence was exerted on the testator, the burden lies with the contestant to “demonstrate the existence and effect of the influence.”548 In Kentucky, no presumption of undue influence arises because the testator was incapacitated or adjudicated incompetent. However, the Kentucky Supreme Court observed that when undue influence and mental impairment are alleged, and the mental impairment of the testator is proven, “the level of undue influence that must be shown is less than would normally be required, since the testator is in a weakened state.”549

Unlike other states, no presumption of undue influence arises in Kentucky when the testator was in a “confidential relationship” with the will beneficiary.550 The Bye court explained that, while the existence of a confidential relationship is evidence to be weighed by the trier of fact in determining whether undue influence has been exerted, “no presumption of wrongdoing is created” by the confidential relationship.551

There is, however, a presumption of undue influence in Kentucky if a will is “grossly unreasonable and the principal beneficiary actively participated in its execution.”552 If the challenger of the will can offer evidence that this occurred, the burden shifts to the proponents of the will. This shift, however, does not “relieve the contestants of the continuing burden of proof.”553 This presumption did not apply in the Bye case, although one of the principal beneficiaries drove the testator to execute his last will. The court said that driving a testator to and

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537 Bye, 975 S.W.2d at 454.
538 Id.
539 Id.
540 Id.
541 Id.
542 Id. at 457.
543 Id.
544 Roland v. Eubanks, 385 S.W.2d 37 (Ky. 1964).
545 Bye v. Mattingly, 975 S.W.2d 451, 457 (Ky. 1998).
546 Id.
547 Id. at 459.
548 Id. at 458.
549 Id.
550 Id.
551 Id.
552 Id.
553 Id.
from his attorney’s office is not, in itself, active participation in
drafting the will; therefore, there was no shift in the burden.\textsuperscript{574}

The presumption of undue influence was applied in an
earlier Kentucky Supreme Court case, In Gay v. Gay,\textsuperscript{575} the
testator had married a much younger woman late in his life, and
the marriage had produced a child.\textsuperscript{576} The testator also had a
nephew, the proponent of the will, who had lived with the
testator for a considerable amount of time. The will in question
devised the testator’s entire estate to his nephew, with the
exception of $25 to his young child. On behalf of her child, the
testator’s widow contested the will on the grounds of undue
influence.\textsuperscript{577}

According to the court, the facts in this case gave rise to the
presumption that the will was made under undue influence.
There was testimony that the testator had filed for divorce from
his young wife, but that after the filing, the testator and his wife
had decided to move back in together. Witnesses testified that a
week later the nephew came to the testator’s house and made
the testator come home with him.\textsuperscript{578} The next day, the nephew
took the testator to the nephew’s lawyer, and the will was
executed.\textsuperscript{579}

There was additional evidence that the testator said that he
wanted to go home while he was living with his nephew. The
lower court refused to allow testimony that the testator told his
little girl he wanted to give her all of his property, although
evidence was presented that he told his child he would give her
“lots of things.” The court found that the facts showed that the
nephew, as the will beneficiary, “was actively concerned with
the preparation of the will . . .and that the will [was] grossly
unreasonable and plainly inconsistent with the testator’s natural
and moral duty to his family.” Because of this, a presumption
arose that the “instrument was not executed by a free and
unhampered will and a fixed purpose.”\textsuperscript{580}

\textsuperscript{574} Id. at 459.
\textsuperscript{575} 215 S.W.2d 92 (Ky. 1948).
\textsuperscript{576} Id. at 93-94.
\textsuperscript{577} Id.
\textsuperscript{578} There was testimony that the testator was crying and said that he had to
leave because “Bud wanted him to.” Id. at 94.
\textsuperscript{579} Gay, 215 S.W.2d at 94.
\textsuperscript{580} Id. at 95.
IV. Will Contests: Precautionary Measures and Litigation Considerations

A. In General

This section of the Portfolio addresses several important issues relating to will contests. Attorneys are first advised of measures that will minimize the possibility of a will contest. However, insulating a will from all challenges is possible only in theory. This section then provides strategic and tactical tips to attorneys who find themselves either contesting or defending a will.

As a threshold matter, only a person with standing may contest a will. Jurisdictions vary, but some generalities are available. Many state statutes provide that only "interested persons" have standing. Generally, only a person with a pecuniary interest in the outcome of the contest would be an "interested person" who could challenge a will. UPC § 1-201(23), for example, provides that an "interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. Thus, a person who would be an intestate heir if the will were declared invalid generally has standing.

Similarly, a person named as a beneficiary under a prior will generally has standing to contest a later will disinheritating that beneficiary. The pecuniary requirement would not grant standing to one whose claim is only emotional. Only those who stand to gain from the will's invalidation have standing to challenge; one who would not obtain more property if the will challenge were successful does not have standing.

Once standing is established, a will can be challenged on a variety of grounds. Many challenges are cast as a complaint that the will did not comply with the requisite statutory formalities. Wills are also frequently challenged on the grounds that the testator did not have the necessary testamentary capacity to execute the will, or that the testator was unduly influenced in making the will or a provision thereof.

1. Maximizing Formalities for Execution

Execution of a will in accordance with the nine-step formalities procedure suggested in II, E, above, should insulate the will from attacks based solely on a failure to comply with statutory formalities.

Careful adherence to ceremonial formalities can also help rebut challenges based on lack of capacity or undue influence. For example, Step 2 of the nine suggested formalities in II, E, above, requires that the witnesses to the will have no interest in the disposition of the testator's property (even when a state statute allows interested witnesses). The disinterested witnesses' attestation of the testator's sound mind can go far to contradict allegations that the testator did not have capacity or was unduly influenced.

Additional measures, above and beyond the suggested formalities, can assist in heading off challenges based on lack of capacity or undue influence. Clearly, an attorney must decline to assist in a will execution when he or she believes that a testator lacks capacity or has been unduly influenced as to a particular disposition of his or her estate. However, an attorney who is convinced of the testator's capacity and freedom from influence owes it to his or her client to take all available steps to demonstrate that testamentary intent and capacity were present. A working knowledge of the "indicia" that courts consider when assessing capacity and influence — and the methods used to counteract them — is critical to dissuade attacks on the will.

2. Avoid the Appearance of Undue Influence

Before will execution, the attorney should meet alone with the client and ascertain that there is no undue influence. Once the attorney is satisfied that the client is acting or her own volition, the attorney should take all necessary steps to ensure that no appearance of undue influence is created. The supervising attorney must be familiar with the factors in his or her jurisdiction that could be indicia of undue influence or that could raise a presumption that undue influence was exerted.

While the states vary in their formulations for undue influence, many states consider whether the principal beneficiary actively participated in the will's preparation and execution. Accordingly, under no circumstances should the beneficiary: (1) be in the room when the execution ceremony is taking place; or (2) be involved in securing the witnesses for the will. In addition, in some states, the presence of a beneficiary when the testator expressed a desire to make a will, the beneficiary's knowledge of the purported contents of the will, before its execution; or the beneficiary giving instructions to the attorney preparing the will would be viewed as active procurement of the will. While the supervising attorney cannot prevent the client from discussing the will contents with the beneficiary (and, in many instances, should not), he or she should be certain to exclude the beneficiary from the attorney's meetings with the testator. The attorney should also scrupulously avoid having any discussions of the will, its contents, or the will's execution with the beneficiary. Many states examine whether the testator received independent advice regarding the testamentary disposition in determining whether undue influence was present. Accordingly, the attorney should not represent both a substan- tial beneficiary and the testator and should not accept payment.
from a substantial beneficiary. The attorney should write detailed notes or a memorandum to memorialize the fact that the client met alone with the attorney and that the client was able to explain, to the attorney’s satisfaction, Bürger her wishes as well as the rationale for the disposition set out in the will.

3. Ascertain Testamentary Capacity

Before executing a will, the attorney needs to ascertain that the client has testamentary capacity. In the broadest sense, a client has testamentary capacity if he or she can recall the persons who would be the natural objects of his or her bounty, and he or she understands the assets he or she holds, the disposition he or she wants to make of his or her assets, and the significance and effect of the act of making a will. The attorney should ask specific questions of the client to confirm that the testator has the requisite mental ability. The questions should specifically refer to the client’s family members and assets. If the client is unable to respond to any one of those questions, the client should not be allowed to execute the will. If, however, after the interview session, the attorney is satisfied that the four-prong test for capacity has been satisfied, the attorney should memorialize his or her conversation with the client with a file document stating the questions asked and the steps taken to determine capacity. Where the testator’s health or other circumstances suggest that a challenge is possible, some additional precautions, described below, should also be considered.

Sometimes the circumstances surrounding a will’s execution greatly increase the likelihood of a challenge based on lack of capacity or undue influence. Such “high risk” situations warrant additional precautions. A discussion follows of the most common high-risk situations and the means to minimize their impact. Extra precautions may also be warranted in certain exceptional circumstances.

B. High-Risk Will Contest Situations

A number of factors should alert an attorney that a will contest is likely. The list below, while not exhaustive, includes more than a dozen situations in which the planning attorney should consider using some additional precautions that are discussed immediately following this list of factors. Attorneys considering bringing a will contest should also be aware of these situations:

- **Disinherited Spouses:** Disinherited spouses can, in almost all states, elect to receive a statutory share of the estate. The statutory share, however, may be less than the spouse would have received under intestacy or under a previously valid will. Thus, a disinherited spouse may contest the validity of a final will disinheriting him or her.
- **Disinherited Children:** In all states except Louisiana, testators are permitted to disinherit their children completely. However, testators should be warned that this act often evokes emotional reactions in the disinherited child that lead to a contest, even if the child does not need the money or property. A higher risk of a will contest also arises where the child is not completely disinherited but receives less than he or she expected.
- **Unequal Distribution to Persons with Equal Relationship to Testator:** A will that provides for disparate treatment of persons who are equally related to the testator may be challenged. For example, if one grandchild receives less than the other grandchildren, that grandchild may argue that the will does not reflect the true wishes of the testator.
- **Multiple Families:** With divorces and second and third marriages becoming more common, the number of persons viewing themselves as having claims to the testator’s property increases correspondingly. Challenges could be brought by first-family members objecting to second- or third-family members, and vice versa.
- **Physically or Mentally Ill Testator:** Death bed wills are always suspect. In addition, a will executed by a frail, elderly, or infirm testator is susceptible to challenges based on lack of capacity or undue influence. This is particularly the case where the testator was hospitalized or was taking several prescription medications around the time of will execution, or the testator had been diagnosed with a deteriorating mental condition, such as Alzheimer’s disease. In addition, the will of a client with a history of alcoholism or substance abuse is vulnerable to challenge.
- **Gay or Lesbian Testator:** A will in which a gay or lesbian testator leaves his or her property to a partner may be challenged by the testator’s excluded family members. This is especially the case when the family members are not aware of or have not accepted the testator’s partnership with the beneficiary.
- **Transgender Relationships:** Similar to the potential problems involved with a gay or lesbian testator, a devise by or to a transgender spouse or partner may be challenged by the testator’s excluded family members.
- **Dominant Person in Testator’s Life:** The testator’s reliance on the beneficiary for day-to-day activities might suggest unusual influence by the beneficiary. Evidence that the beneficiary has isolated the testator from family members or from long-time acquaintances is troublesome.

898 For other issues that may raise ethical concerns, see the ethics discussion below in IV, D.

899 In re Lion Chamer Will, 13 Fd. Rep. 2d 255 (Pa. Orphans’ Ct. 1993), a Pennsylvania court commented favorably on the care taken by the drafting attorney in conducting and documenting a thorough interview of a client who had a long history of alcoholism before will execution. According to the Lion Chamer court, the attorneys’ actions in interviewing and questioning the client served to ascertain that he possessed testamentary capacity, despite the substance abuse problems he may have been afflicted with at the time. The court found the attorneys’ actions to be “a textbook example of how a sensitive, aware, and careful professional can take steps to insure that a person suffering from a psychiatric or substance abuse problem [can] nevertheless execute a valid will.” In that case, the will was sustained despite a challenge based on lack of capacity due to alcoholism. See Hellingen, “Survey of Significant Developments in the Law: Decedent’s Estates and Trust Laws,” 66 Pa. B. Ass’n Q.J. 93, 97 (July 1995).


901 In one case, the son of an intestate decedent challenged his father’s marriage to a post-operational transgender as a same-sex marriage. The court agreed with the son, who filed this action before his father’s estate. See, e.g., In re Estate of Goistner, 42 Fdld 120 (Kan. 2002).
Similarly, involvement of the beneficiary in obtaining the drafting attorney for the will execution is suspect, particularly if a new attorney replaces one with long-term ties to the testator.

- Large Devises to Beneficiary Without Long-Term Ties to Testator. A large devise to a relative newcomer in the testator’s life should be examined carefully. For example, an elderly widower who changes his will to benefit a person who only recently entered his life may be challenged by those with long-term ties to the testator.

- Devises to Nursing Home. A devise to the nursing home or the operators of the nursing home where the testator is confined is suspect. In addition, any devise to a long-term care facility or to a caregiver with physical control of the testator is subject to challenge.

- Gifts to Lawyers or Lawyer’s Clients. A gift to the drafting lawyer is open to challenge. Similarly, a devise to a person suggested as a beneficiary by the drafting lawyer is also suspect.

- Substantial Deviations from a Prior Will. Any beneficiary (including a non-family member) who obtains less than the beneficiary would have obtained under a prior will may challenge the validity of the later will. Any major change in the testamentary scheme without a clear rationale (such as death of a previous devisee) is suspect.\(^{388}\)

- Imposition of Excessive Restrictions on Gifts. Devises that are in trust or that are otherwise restricted may produce disgruntled beneficiaries. Such a beneficiary may challenge the will if the challenge would result in the beneficiary obtaining the property outright, through intestacy, or through a previously valid non-restricted will.

- Large Devises for Charities. A testator is free to leave his or her property to charity. However, where the majority of the testator’s estate goes to charitable organizations, as opposed to family members, the disinterested family members may attempt to challenge the will. Large devises to charities are more suspicious in cases where the testator does not have a history of charitable giving or where the testator leaves a charity for which he or she had no known particular interest.\(^{388}\)

C. Additional Precautions

In any high risk situation involving a challenge for lack of testamentary capacity or undue influence, the additional precautions suggested below should be considered.

1. Using Appropriate Witnesses

Where the testator’s will might be open to challenge on the testator’s mental capacity, particular care should be taken in selecting witnesses to the execution. Persons with long-term relationships with the testator, particularly those with a history

389 Id.
389 See Hill, "Post Mortem Considerations in Contesting a Will," ABA Sec. of Real Property, Probate and Trust Law, 7th Annual Spring CLE and Continuing Meeting Protests and Trusts Programs, at 3-11, 3-18 (1996). Some jurisdictions, such as Florida, do not allow继承 for will contests. In those states, the attorney should carefully list the elements for the expert. Several sample jury instructions for both testamentary capacity and undue influence are included in the Worksheets.

Changes and Analysis of New Developments appear in the front of this portfolio
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The converse, however, is also true. A visual recording showing a testator who appears frail, confused, or disoriented could backfire and bolster a challenge based on the mental elements. If, after weighing the risks of using videotape or digital recording, the testator decides to visually record the execution of the will or the interview session, the attorney and the testator should consider: (1) the appropriate setting (e.g., testator’s home, testator’s office, attorney’s office); (2) the format (e.g., an attorney interview of the testator or a monologue by the testator); and (3) storage options to ensure that the recording, whether on videotape or digital media, is not disturbed.

4. No-Contest Clause

A no-contest clause (also referred to as an “in terrorem” clause) is a provision in a will that reduces or eliminates a beneficiary’s devise if the beneficiary contests the will. When a will contains such a provision, the beneficiary has to decide whether to: (1) take the devise under the will; or (2) contest the will, in the hopes of obtaining a larger portion of the estate via intestacy or a previous will. If the contestant chooses the latter and the challenge is unsuccessful, then the terms of the no-contest clause take effect. In order for the clause to deter the contestant, the bequest to the likely contestant should be fairly significant. In some jurisdictions (e.g., Florida), no-contest clauses are not enforceable. In other jurisdictions, however, no contest clauses are enforceable. However, even in jurisdictions that enforce them, the courts generally will not enforce a no-contest clause if the will contest is brought in good faith and with “probable cause.” The “probable cause” threshold is found in UPC § 3-905, which provides that a no-contest clause may not be enforced if probable cause exists for initiating the will contest. Although the jurisdictions vary, probable cause is generally found when a reasonable person, who has been properly informed and advised, would conclude at the time the contest is initiated that there is a substantial likelihood that the contest will be successful. A factor that weighs favorably in finding that probable cause exists is that the contestant relied upon the advice of counsel sought in good faith. Since not all jurisdictions recognize no-contest clauses, and application of the “probable cause” exception varies by jurisdiction, the laws of the particular jurisdiction must be consulted before one is included in a will.

5. Recitation Clause

The attorney should consider the use of a “recitation clause,” either in the will or in a separate document, that explains in clear, unemotional terms the reasons for any out-of-the-ordinary distributions. The clause could explain why certain persons who might be natural objects of the testator’s bounty are receiving less than expected under the testator’s will. The clause must be written with care to avoid a challenge by the disinterested beneficiary on the grounds that the clause is incorrect. If, for instance, the clause states that the testator had provided for the beneficiary through recent transfers of property, when in fact no transfers were made, the mistake in the clause could be evidence that the testator lacked capacity since he or she did not know the extent of his or her property. Moreover, the language should be written in a way that is devoid of negative connotations or emotions. Anything other than bland factual statements may inflame the emotions of an already disappointed and disgruntled heir and may, in fact, serve as a catalyst for a challenge. Practitioners should consider including the recitation clause in a memorandum to the file, rather than in the will. Unlike a will, which is a public document, a separate memorandum would only come to light in the event the will is actually challenged. Thus, the testator’s reasons for excluding any potential beneficiaries may never see the light of day and, therefore, would not serve as the basis for a challenge.

5. Successive Wills with the Same Testamentary Plan

In the event the testator’s final will is successfully challenged, an earlier will executed by the testator (and not physically revoked) would be effective to dispose of the testator’s estate. The attorney should consider having the testator draft successor wills with the same plan of disposition because each will would have to be contested in order for a non-beneficiary to thwart the testator’s plan. A variation on this concept is for the testator to handwrite his or her testamentary scheme in jurisdictions that allow holographs before execution of the final will. Thus, if the final will is successful challenged, the testator’s holographic plan could distribute the testator’s estate. Another variation on this option is for the testator to execute one or more codicils after execution that do not change the testamentary scheme but that republish the will.

7. Pre-Mortem Probate

Pre-mortem probate allows testators to commence a proceeding to determine the validity of their wills before death. Very few states have statutes providing for pre-mortem probate. These statutes allow any person who executes a will to seek a declaratory judgment on the validity of the will as to formalities, testamentary capacity, and freedom from undue influence. The statutes generally require that all beneficiaries under the will and all existing potential intestate heirs be named parties. If the court finds that the will complied with execution formalities, that the testator had the requisite testamentary capacity, and that the testator was free from undue influence, the court will declare that the will is valid and effective to dispose.
of the testator’s property, unless the testator revokes the will or executes a subsequent will.

8. Intervivos Gift to Likely Contestant

If, contemporaneously with will execution, a testator makes a gift of property to a likely will contestant and the contestant accepts the gift, this action suggests that the contestant thought that the testator had capacity to make gifts at that time. Although such evidence would certainly not be determinative of testamentary capacity, it could be used during a will contest trial to cross-examine the contestant.

9. Non-Probate Assets

Where a contest is expected, the client should be advised about transferring assets during lifetime rather than at death. Instead of transferring property via the will, property can be put in a joint tenancy with right of survivorship with the intended beneficiary, or the property could be transferred to an inter vivos trust for the benefit of the intended beneficiary. Such lifetime transfers take the property out of the probate estate; thus, challenges to the will would have no effect on the property. While lifetime transfers are still subject to mental elements challenges, each transfer would have to be challenged separately from a challenge to the will.

D. Ethical Considerations

While all attorneys have an ethical obligation to be competent and diligent and to communicate with their clients, they should be aware of the ethical issues affecting will execution and will contests. This section highlights some of the most important ethical issues.  

I. Ethical Issues for the Drafting Attorney

a. Lawyer’s Representation of Testator and Beneficiary

A lawyer who is asked to draft a will that names another of the lawyer’s clients as a beneficiary must consult the Model Rules of Professional Conduct R. 1.7 (2013). This rule, entitled “Conflict of Interest: Current Clients,” provides:

(a) Except as provided in paragraph (b), a lawyer
shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Compliance with this rule will help to insure that the lawyer’s representation of the testator was not influenced by any interest of the beneficiary, thus avoiding any argument that the beneficiary unduly influenced the testator’s plan for disposition of the property. The lawyer’s compliance with Rule 1.7 means that the lawyer will not draft the will for the testator if the representation of the testator will be “materially limited” because of the lawyer’s representation of the beneficiary. For example, a lawyer should not draft the will of a client’s parent if the lawyer’s relationship with the client will in any way influence the lawyer’s representation of the parent. It would be particularly troublesome to represent the client’s parent in preparing a will that leaves substantially more to the client/beneficiary than to other children of the parent. The lawyer must comply with the Model Rules of Professional Conduct R. 1.8(f) (2013), “Conflict of Interest: Current Clients: Specific Rules,” and should consider cautioning both the client/beneficiary and the parent that the client/beneficiary may be presumed to have exerted undue influence on the testator because of the client/beneficiary’s relationship with the drafting attorney.
IV.D.1.b.

The lawyer should also hesitate in drafting a will where the testator wishes to devise less than expected, or nothing at all, to the lawyer’s client. The lawyer’s representation of the testator may be deemed “directly adverse” to the client who may wish to challenge the will for lack of testamentary capacity or undue influence by another.

b. Lawyer’s Fee Paid by a Beneficiary of the Will

An ethical issue is raised when a lawyer is asked to draft a will for a testator, by one who will pay the lawyer’s fee and will be a beneficiary of the testator’s will. The Model Rules of Professional Conduct R. 1.8(f) (2013) provides:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of the client is kept confidential.

Thus, to eliminate a potential undue influence argument based on the beneficiary’s retention and compensation of the lawyer who drafts the will, a lawyer should consider very carefully whether to engage in the representation. Rule 1.8(f) allows a lawyer to draft a will under these circumstances only if the testator consents to the arrangement, if the lawyer can represent the best interests of the testator, independent of the demands and interests of the beneficiary; and if the lawyer does not disclose any information to the beneficiary without the testator’s consent. If the lawyer does accept the fee from the beneficiary, he or she should caution both parties that a presumption of undue influence may be created.

c. Lawyer as a Beneficiary of Testator’s Will

A large devise to the testator’s attorney may suggest that the lawyer unduly influenced the testator; thus, a lawyer should not draft a will for the lawyer is designated a beneficiary. In fact, the Model Rules of Professional Conduct R. 1.8(c) (2013) provides:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Thus, a lawyer cannot ethically draft a will where the lawyer, or a relative or close friend of the lawyer, is also a named beneficiary of a substantial gift, unless the lawyer, or the lawyer’s relative or friend, is also a relative of the testator. Even if the will is for a relative, the lawyer should be careful, particularly if the lawyer/beneficiary would receive more under the will than others with the same relationship to the testator.

In addition to creating ethical problems, some jurisdictions by statute invalidate gifts made to the drafting attorney. For example, Florida Statute § 732.806 provides: “Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.” The Texas statute invalidating such gifts to attorneys and relatives also invalidates gifts to employees of such attorneys.

d. Lawyer’s Client as a Beneficiary of Testator’s Will

A lawyer should seriously consider whether he or she can ethically recommend a beneficiary to a testator who is perhaps searching for a charitable organization to receive part of the testator’s estate. If the suggested organization is the lawyer’s client, the Model Rules of Professional Conduct R. 1.7 (2013), mentioned above, must be consulted. Such a devise may suggest that the attorney’s concern for the charitable organizationclouded the attorney’s objectivity when drafting the will for the testator. In addition, regardless of whether the suggested organization is the lawyer’s client, such a recommendation may open the way for a challenge to the will based on the lawyer’s undue influence on the testator.

e. Lawyer Named as Executor

Another ethical issue for the drafting attorney arises if the client wants the attorney to serve as executor of the will. The Model Rules of Professional Conduct R.1.7 (2013) prohibits the attorney from naming himself or herself the executor if the attorney is doing it for reasons other than the best interest of the client. It is important that the client be advised that he or she is free to select the appropriate executor and that he or she need not choose the drafting attorney to fill the role. A similar issue arises when the attorney is asked by the client to suggest a corporate fiduciary or executor. The attorney should not steer the client into using a particular corporate fiduciary that has a practice of sending business to the attorney. The attorney must focus on the best interest of the client.

f. Client Under a Disability

An ethical concern for the drafting attorney arises when the attorney is asked to draft a will for a questionable competent client. The Model Rules of Professional Conduct R. 1.14 (2013), entitled “Client with Diminished Capacity,” provides: 

605 In fact, the Model Code of Professional Responsibility, the ethical code for attorneys adopted by the ABA in 1980, included the following ethical standard for attorneys: “A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid the appearance of improperity.” Model Code of Prof’l Responsibility EC 5.6 (1980). The ABA replaced the Model Code with the Model Rules in 1983.

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(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [the confidentiality rule]. When taking protective action pursuant to paragraph (b), the lawyer is implicitly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

As an initial matter, a lawyer cannot ethically enter into a lawyer-client relationship with a client who is not capable of making decisions about legal matters. In addition, a client who does not possess testamentary capacity cannot execute a valid will. Thus, the attorney who is presented with a testator whose capacity is in question must proceed with extreme caution. The lawyer should first consider whether the testator possesses adequate capacity to enter into a lawyer-client relationship. If the testator does not, then the lawyer should not represent the testator.

In the event of an ongoing relationship with a client whose capacity becomes questionable, the attorney should attempt to maintain a normal lawyer-client relationship with the testator. This does not, however, mean that the attorney should draft a will for the client if the attorney believes the client may lack testamentary capacity. In such cases, it may be appropriate for the lawyer to consult forensic psychiatrists, geriatric specialists, or other experts for mental competency evaluations. Finally, the lawyer should consider whether a guardian should be appointed for the client or whether other protective actions should be taken.

2. Ethical Issues for the Litigating Attorney
   a. Lawyer’s Representation of Personal Representative

The lawyer who has been retained by the personal representative may encounter an ethical dilemma if the will is challenged. While the lawyer may want to represent the personal representative in a dispute with beneficiaries or other contestants, a conflict exists if the lawyer has learned confidential information from any of the beneficiaries while representing the personal representative in his or her role as such. The Model Rules of Professional Conduct R. 1.7 (2013) would prohibit the lawyer from representing the personal representative in such a dispute if the lawyer’s knowledge of confidential information would hinder the lawyer’s representation of the estate.618 A conflict may also exist if the interests of the personal representative do not coincide with the best interests of the estate, for example, when the personal representative has allegedly mismanaged the estate.

b. Lawyer as Witness

The Model Rules of Professional Conduct R.3.7(a) (2013) provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
   (1) the testimony relates to an uncontested issue;
   (2) the testimony relates to the nature and value of legal services rendered in the case; or
   (3) disqualification of the lawyer would work substantial hardship on the client.

This raises an ethical issue for the litigating attorney who may also have been involved in the drafting of the will. It is extremely likely that the drafting attorney will be a necessary witness if a will is challenged on grounds of lack of capacity or undue influence. Thus, unless the disqualification of the lawyer would work substantial hardship on the client (i.e., the estate), the attorney should seriously evaluate whether to represent the estate in a will contest where he or she is likely to be a necessary witness.

618 See IV, D, 1, n. above.
# TABLE OF WORKSHEETS

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*The authors have provided a selection of jury instructions concerning due execution of wills, testamentary intent, and capacity, and undue influence and confidential relationship. An attorney should always consult the latest edition of any suggested jury instructions in his or her jurisdiction. In addition, the attorney should ensure that any such jury instructions reflect the elements of the law of the particular jurisdiction. If the instructions do not incorporate more recent changes in the law, the attorney should ensure that the instructions are modified accordingly before being given to the jury.*
Checklist for Proper Execution of Will

This checklist suggests steps that the drafting attorney should follow to provide that the will is acceptable with regard to formalities in the maximum number of states. Each and every step is vital and should be performed in the order in which they appear below. This checklist is for illustrative purposes only. It should be used to execute a will for a particular client only after careful analysis and appropriate adaptation, based upon the client’s individual circumstances.¹

1. The attorney should proofread the will carefully.
2. The testator should examine the will in its entirety.
3. The attorney should review the will with the client and make certain that the testator understands the terms of the will.
4. The attorney should prepare the room where the ceremony will be held.²
5. The testator, the witnesses to the will,³ the notary, and the attorney should assemble around the conference table. No one should enter or leave this room until the execution of the will is completed.
6. The attorney should ask the testator the following question: “Do you declare in the presence of [the witnesses] that the document before you is your will, that its terms have been explained to you, and that the document expresses your desires as to the disposition of the property referred to therein on your death?” The testator should answer “yes,” and the answer should be audible to the witnesses.
7. The attorney should ask the testator the following question: “Do you request that the witnesses] to witness your signing of your will?” Again, the testator should answer “yes,” and the answer should be audible to the witnesses.
8. The testator should sign in the place provided for the testator’s signature at the end of the will.⁴ The testator should also sign on the bottom of each page of the will.
9. One of the witnesses should then read aloud the attestation clause and each witness should state that the attestation clause is a correct statement.
10. Each witness should then sign in the place provided for the signatures of the witnesses following the attestation clause. Each witness should give an address opposite his or her signature.
11. The testator and the witnesses should execute a self-proving affidavit in front of the notary.⁵

¹ This checklist is intended for the typical execution of a will. If an attorney determines that additional precautions, such as those discussed in section IV of the Detailed Analysis, above, are necessary, they should be added to the checklist.
² The room should be arranged to ensure that all the parties necessary for the execution ceremony will be seated so they can see each other at all times. Optionally, each of the participants should sit around a small table (preferably a round conference table). The attorney should take necessary steps to ensure that the ceremony, once begun, will not be interrupted.
³ Although all states now only require two witnesses to a will, many attorneys use supernumerary witnesses to help thwart challenges. Louisiana requires a notary in addition to two witnesses. The witnesses should be disinterested.
⁴ In Texas, only one document should be executed. No copies should be executed.
⁵ Most states have specific statutes and forms for making a will self-proving. For e.g., Alaska Stat. § 13.12.504 (form for a self-proved will). Even in states that do not currently allow self-proof, it may be advisable to execute a self-proving affidavit in case the law changes in the testator’s state of domicile or the testator moves to a state that allows self-proving wills.
Sample Attestation Clauses

The following is a general attestation clause where the witnesses attest to having witnessed the testator sign the will:

The foregoing instrument was signed on ________ (date) by ____________ (the testator) and the testator, in the presence of the witnesses, declared the document to be his will and requested each of the witnesses to witness his signing of the document, and each of the witnesses did witness the signing of the document and each witness in the presence of the testator and in the presence of the other witnesses does sign as witness.

A variation on the general attestation clause includes language attesting to the testator's mental state at the time of execution:

The foregoing instrument was signed on ________ (date) by ____________ (the testator) and the testator, in the presence of the witnesses, declared the document to be his will and requested each of the witnesses to witness his signing of the document, and each of the witnesses did witness the signing of the document and each witness in the presence of the testator and in the presence of the other witnesses does sign as witness, and that each witness does declare that to the best of his or her knowledge the testator is of sound mind and memory and free from undue influence.

If the testator's name was signed by proxy, the attestation clause should reflect that fact:

The foregoing instrument was signed on ________ (date) by ____________ (the proxy) on behalf of and at the request and in the presence of ____________ (the testator), who is unable to sign for himself, and the testator, in the presence of the witnesses, declared the document to be his will and requested each of the witnesses to witness the proxy's signing of the testator's name, and each of the witnesses did witness the signing of the document and each witness in the presence of the testator and in the presence of the other witnesses does sign as witness.
Sample Self-Proving Affidavit Forms

(Arizona, Florida, Iowa, Kentucky, and Pennsylvania)

Arizona — Ariz. Rev. Stat. Ann. § 14-2504 provides the following:
§ 14-2504. Self-proved wills; sample form; signature requirements.

A. A will may be simultaneously executed, attested and made self-proved by its acknowledgment by the testator and by affidavits of the witnesses if the acknowledgment and affidavits are made before an officer authorized to administer oaths under the laws of the state in which execution occurs and are evidenced by the officer’s certificate, under official seal, in substantially the following form:

I, ________, the testator, sign my name to this instrument this _________ day of ________, and being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in that document and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

________________________
Testator

We, __________, __________, the witnesses, sign our names to this instrument being first duly sworn and do declare to the undersigned authority that the testator signs and executes this instrument as his/her will and that he/she signs it willingly, or willingly directs another to sign for him/her, and that each of us, in the presence and hearing of the testator, signs this will as witness to the testator’s signing and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence.

________________________
Witness

________________________
Witness

The State of _____________
County of ________________

Subscribed, sworn to and acknowledged before me by __________, the testator, and subscribed and sworn to before me by __________ and __________, witnesses; this __________ day of __________.

(Seal)

(Signed)__________________

(Official capacity of officer)

B. An attested will may be made self-proved at any time after its execution by its acknowledgment by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer’s certificate, under the official seal, attached or annexed to the will in substantially the following form:

The State of _____________
County of ________________

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We, ___________________ and ___________________, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument being first duly sworn do declare to the undersigned authority that the testator signed and executed the instrument as the testator’s will and that he/she signed willingly, or willingly directed another to sign for him/her, and that he/she executed it as his/her free and voluntary act for the purposes expressed in that document, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his/her knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator
Witness
Witness

Subscribed, sworn to and acknowledged before me by ___________________, the testator, and subscribed and sworn to before me by ___________________ and ___________________, witnesses, this ______ day of ______.

(Seal)
(Signed)
(Official capacity of officer)

C. A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will’s due execution.

Florida — Fla. Stat. § 732.503 provides the following:
§ 732.503. Self-proof of will.

(1) A will or codicil executed in conformity with s. 732.502 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgment of it by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer’s certificate attached to or following the will, in substantially the following form:

\STATE OF FLORIDA\nCOUNTY OF ___________________

I, ___________________, declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

____________________
Testator

We, ___________________ and ___________________ have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator’s will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

____________________
Witness
____________________
Witness
Acknowledged and subscribed before me by the testator, (type or print testator’s name), who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and sworn to and subscribed before me by the witnesses, (type or print name of first witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification and (type or print name of second witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on (date).

(Signature of Officer)
(Print, type, or stamp commissioned name and affix official seal)

(2) A will or codicil made self-proved under former law, or executed in another state and made self-proved under the laws of that state, shall be considered as self-proved under this section.

Iowa—Iowa Code Ann. § 633.279(2)(a) provides the following:
§ 633.279 2. Self-Proved Will.

a. An attested will may be made self-proved at the time of its execution, or at any subsequent date, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before a person authorized to administer oaths and take acknowledgments under the laws of this state, and evidenced by such person’s certificate, under seal, attached or annexed to the will, in form and content substantially as follows:

Affidavit
State of ____________________________
County of ____________________________

We, the undersigned, __________, __________, and __________, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, declare to the undersigned authority that at the date of the instrument, we all knew the identity of each other; the instrument was exhibited to the witnesses by the testator, who declared it to be the testator’s last will and testament and was signed by the testator or by another at the direction of the testator as __________, on the date shown in the instrument, and in the presence of each other as subscribing witnesses; that we, as witnesses, declare to the undersigned authority that in our presence the testator executed and acknowledged such will as the testator’s will and that we, in the testator’s presence, at the testator’s request, and in the presence of each other, did subscribe our names thereto as attesting witnesses on the date of such will; and that the witnesses were sixteen years of age or older.

________________________
Testator

________________________
Witness

________________________
Witness

Subscribed, sworn and acknowledged before me by __________, the testator; and subscribed and sworn before me by __________ and __________, witnesses, this __________ day of __________, __________ year.

(Stamp)
Notary Public, or other notarial officer authorized to take and certify acknowledgments and administer oaths.
Worksheet 3

Kentucky — Ky. Rev. Stat. Ann. § 394.225 provides the following:
§ 394.225 Self-proved will.

(1) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this state and evidenced by the officer’s certificate, in substantially the following form:

I, __________, the testator, sign my name to this instrument this ____ day of ________, [20__], and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

(Testator)

We, __________, __________, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator and in the presence of the other subscribing witness, hereby signs this will as witness to the testator’s signing, and that to the best of our knowledge the testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

(Witness)

(Witness)

THE STATE OF __________
COUNTY OF __________

Subscribed, sworn to and acknowledged before me by __________, the testator and subscribed and sworn to before me by __________ and __________, witnesses, this ____ day of ________.

(Signed)__________________________

(Official Capacity of Officer)
(2) An attested will may, at any time subsequent to its execution, be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of
this state, and evidenced by the officer’s certificate, attached or annexed to the will in form and content substantially as
follows:

THE STATE OF _______________
COUNTY OF _______________

Before me, the undersigned authority, on this day personally appeared __________, __________, and __________ known
to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and,
all of these persons being by me first duly sworn __________ the testator, declared to me and to the witnesses in my presence
that the instrument is his last will and that he had willingly signed or directed another to sign for him, and that he executed
it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and
hearing of the testator, that he signed the will as witness in the presence of the testator and of the other subscribing witness,
and that to the best of his knowledge the testator was eighteen years of age or over, of sound mind and under no constraint
or undue influence.

__________________________
(Testator)

__________________________
(Witness)

__________________________
(Witness)

Subscribed, sworn and acknowledged before me by __________, the testator, subscribed and sworn before me by
_________, __________, witnesses, this ________ day of __________, A.D., __________.

(ORIGINAL CAPACITY OF OFFICER)

(3) The execution of an acknowledgment of a will by a testator, and of the affidavits of witnesses, made before an officer
authorized to administer oaths under the laws of this state and evidenced by the officer’s certificate substantially in the form
set out in this section during the period between June 21, 1974 and the effective date of the 1982 amendments to this section
shall be considered to be a valid execution and attestation of a written will even though the will was not signed and attested
separately from the execution of the acknowledgment by the testator and the affidavits of the witnesses.

(4) A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise treated
no differently from a will not self-proved.

Pennsylvania — 20 Pa. Cons. Stat. § 3132.1 provides the following:
§ 3132.1. Self-proved wills

(a) PROOF. — Unless there is a contest with respect to the validity of the will, or unless the will is signed by mark or by
another as provided in section 2502 (relating to form and execution of a will), an affidavit of witness made in conformity with
this section shall be accepted by the register as proof of the facts stated as if it had been made under oath before the register
at the time of probate.

(b) ACKNOWLEDGMENT AND AFFIDAVITS. — An attested will may at the time of its execution or at any subsequent
date be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before
an officer authorized to administer oaths under the laws of this Commonwealth or under the laws of the state where execution
occurs, or made before an attorney at law and certified to such an officer as provided in subsection (c) and evidenced, in either
case, by the officer’s certificate, under official seal, attached or annexed to the will. A separate affidavit may be used for each
witness whose affidavit is not taken at the same time as the testator’s acknowledgment. The acknowledgment and affidavits
shall in form and content be substantially as set forth in the Uniform Probate Code or as follows:

Acknowledgment
Commonwealth of Pennsylvania (or State of __________) County of __________

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ISBN 978-1-61760-848-0 B - 305
Worksheet 3

I, _______________________________________, the testator whose name is signed to the attached or foregoing instrument, having been duly qualified according to law, do hereby acknowledge that I signed and executed the instrument as my Last Will; and that I signed it willingly and as my free and voluntary act for the purposes therein expressed.

Sworn to or affirmed and acknowledged before me by ____________________________, the testator, this ______ day of ________, [20]

__________________________________________
(Testator)

(Signature of officer or attorney)
(Seal and official capacity of officer or state of admission of attorney)

Affidavit
Commonwealth of Pennsylvania (or State of ______________) County of ______________

We (or I), __________________________ and __________________________, the witness(es) whose names are (is) signed to the attached or foregoing instrument, being duly qualified according to law, do depose and say that we were (I was) present and saw the testator sign and execute the instrument as his Last Will; that the testator signed willingly and executed it as his free and voluntary act for the purposes therein expressed; that each subscribing witness in the hearing and sight of the testator signed the will as a witness; and that to the best of our (my) knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Sworn to or affirmed and subscribed to before me by __________________________ and __________________________, witness(es), this ________ day of ______________, [20]________.

__________________________________________
Witness

__________________________________________
Witness

(Signature of officer or attorney)
(Seal and official capacity of officer or state of admission of attorney)

(c) ACKNOWLEDGMENT AND AFFIDAVIT TAKEN BEFORE AN ATTORNEY AT LAW. — The acknowledgment of the testator and the affidavit of a witness required by subsection (b) may be made before a member of the bar of the Supreme Court of Pennsylvania or of the highest court of the state in which execution of the will occurs who certifies to an officer authorized to administer oaths that the acknowledgment and affidavit were made before him. In such case, in addition to the acknowledgment and affidavit required by subsection (b), the attorney’s certification shall be evidenced by the officer before whom it was made substantially as follows:

Commonwealth of Pennsylvania (or State of ______________) County of ______________

On this, the ________ day of ______________, [20]________, before me, __________________________, the undersigned officer, personally appeared __________________________, known to me or satisfactorily proven to be a member of the bar of the highest court of (Pennsylvania or the state in which execution of the will took place), and certified that he was personally present when the foregoing acknowledgment and affidavit were signed by the testator and witnesses.

In witness whereof, I hereunto set my hand and official seal.

(Signature, seal and official capacity of officer)
Sample No-Contest ("in terrorem") Clauses*

The following is a general no-contest clause eliminating entirely any devise to a beneficiary who contests the will. This clause treats the contesting beneficiary as if he or she had predeceased the testator and does not specifically handle the "lapsed" devise.

If any beneficiary challenges or contests the terms or the probate of this Will, including, without limitation, filing a [insert appropriate title and statutory authority for petitions for contests in jurisdiction], that beneficiary shall not be entitled to any property under this Will, and for all purposes of this Will that beneficiary shall be deemed to have predeceased me.

A variation on the general no-contest clause treats the contesting beneficiary as if he or she had predeceased the testator but provides for an alternate taker for the devise, which could be the residuary devisee or another.

If any beneficiary challenges or contests the terms or the probate of this Will, including, without limitation, filing a [insert appropriate title and statutory authority for petitions for contests in jurisdiction], that beneficiary shall not be entitled to any property under this Will, and for all purposes of this Will that beneficiary shall be deemed to have predeceased me and _______ shall receive that beneficiary’s devise.

Alternatively the testator might tailor the no-contest clause only to a specific beneficiary. The specific no-contest clause treats the contesting beneficiary as if he or she had predeceased the testator and provides for an alternate taker for the devise, which could be the residuary devisee or another.

If _______ challenges or contests the terms or the probate of this Will, including, without limitation, filing a [insert appropriate title and statutory authority for petitions for contests in jurisdiction], that beneficiary shall not be entitled to any property under this Will, and for all purposes of this Will that beneficiary shall be deemed to have predeceased me and _______ shall receive that beneficiary’s devise.

The no-contest clause may also state that, rather than treating the contesting beneficiary as having predeceased the testator, the devise itself will be revoked and provide for an alternate taker, which could be the residuary devisee or another.

If any beneficiary challenges or contests the terms or the probate of this Will, including, without limitation, filing a [insert appropriate title and statutory authority for petitions for contests in jurisdiction], that beneficiary shall not be entitled to any property under this Will, and for all purposes of this Will that beneficiary’s devise shall be revoked and _______ shall receive that beneficiary’s devise.

* Some jurisdictions will not enforce no-contest clauses. For example, Fla. Stat. § 732.517 provides the following: "[a] provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable." The majority of jurisdictions will only refuse to enforce a no-contest clause if the will contest is brought in good faith and with probable cause. Since not all jurisdictions recognize no-contest clauses, and application of the probable cause exception varies by jurisdiction, the laws of the particular jurisdiction must be consulted before one is used.
Colorado Jury Instructions for Civil Trials for Statement of the Case, Due Execution, Conscious Presence, Testamentary Intent, Testamentary Capacity and Sound Mind, Insane Delusion, Undue Influence, and Confidential Relationship*

34:1 WILL CONTEST — STATEMENT OF THE CASE

(I) (The Court) will now instruct you as to the claims of each party to the case and the law governing the case. Please pay close attention to these instructions. You must all agree on your verdict. You must apply the law to the facts.

The parties to the case are:

The proponent, (name), who is the party offering the will for probate, and the contestant, (name), who is the party opposing the admission of the will to probate.

The proponent claims the offered will was properly signed by (name of alleged testator) as (his) (her) (signed and witnessed) (self-proved) (or) (holographic) will.

Even though the court has determined that the offered will was not properly signed by [name of alleged testator], the court has also determined that it should nonetheless be treated as if it had been properly signed as (his) (her) (signed and witnessed) (or) (holographic) will.

The contestant claims that the will should not be admitted to probate because:

(Insert the basis of the objection).

These are the issues you are to determine, but are not to be considered by you as evidence in the case.

34:2 ELEMENTS OF PROOF OF PROPERLY EXECUTED, SIGNED AND WITNESSED WILL — ALL WILLS EXCEPT SELF-PROVED AND HOLOGRAPHIC

For the proponent, (name), to have the writing that has been admitted into evidence and identified as (insert appropriate description) admitted to probate as the will of the testator, (insert name of alleged testator), you must find the following have been proved by a preponderance of the evidence:

1. The writing (insert appropriate description) was signed by (name of alleged testator) or (someone for (name of alleged testator): in (his) (her) conscious presence and at (his) (her) direction; and

2. Either before or after the testator’s death, the writing was signed by at least two persons, each of whom signed it within a reasonable time after (either):
   
   (a) (seeing (name of alleged testator) sign the writing) (or)
   
   (b) (seeing (name of alleged testator) acknowledge the signature on the writing as being (his) (her) (or)
   
   (c) (seeing (name of alleged testator) acknowledge the writing as being (his) (her) will).

If you find that proposition 1 or 2 has not been proved by a preponderance of the evidence, then your verdict must be for the contestant, (name).

On the other hand, if you find that both propositions 1 and 2 have been proved, (then your verdict must be for the proponent) then you must consider the contestant’s claim(s) that [insert an appropriate description of any of the contestant’s claims on which the contestant has the burden of proof, e.g., “that (name of alleged testator) was not of sound mind at the time he signed the will”].

If you find that (this claim has) (any one or more of these claims have) been proved by a preponderance of the evidence, then your verdict must be for the contestant.

However, if you find that (this claim has not) (none of these claims have) been proved, then your verdict must be for the proponent.

34:3 CONSCIOUS PRESENCE — DEFINED

“Conscious” means that the testator, (name), was aware through one or more of (his) (her) senses of the presence of the person signing the will at (his) (her) direction. “Presence” requires that person was physically near the testator, though not necessarily in (his) (her) line of sight.

34:7 TESTAMENTARY INTENT — DEFINED

Testamentary intent means the intent to direct how some or all of one’s property is to be disposed of after one’s death. A person need not express that intent by stating that a writing is his or her will. The intent may be shown by other words or acts.

34:11 TESTAMENTARY CAPACITY AND SOUND MIND — DEFINED

A will that was signed when the person making the will did not have testamentary capacity is not valid and may not be admitted to probate. (Name of alleged testator) did not have testamentary capacity if (his) (she) (was not eighteen years of age or older) (or) (was not of sound mind) when the will was signed.
Worksheet 5

(A person is not of sound mind if, when signing a will, [he or she was suffering from an insane delusion that affected or influenced that person's decisions regarding property included in the will] or [he does not understand all of the following:]
1. That he or she is making a will;
2. The nature and extent of the property he or she owns;
3. How that property will be distributed under the will;
4. That the will distributes the property as he or she wishes; and
5. Those persons who would normally receive his or her property.)

34:12 INSANE DELUSION — DEFINED

An insane delusion is a persistent belief, resulting from illness or disorder, in the existence or non-existence of something that is contrary to all evidence.

34:14 UNDUE INFLUENCE — DEFINED

Undue influence means words or conduct, or both, which, at the time of the making of a will,
1. deprived the person making the will of his or her free choice, and
2. caused the person making the will to make it or part of it differently than he or she otherwise would have.

34:15 FACTORS TO BE CONSIDERED IN DETERMINING UNDUE INFLUENCE

Undue influence cannot be inferred solely because one or more persons may have had a motive or an opportunity to influence (name of alleged testator) in the making of (his) (her) will.

Influence gained by reason of love, affection or kindness, or by appeals to such feelings is not undue influence.

You may consider the provisions in the will in determining whether or not (name of alleged testator) was acting under undue influence at the time (he) (she) made the (claimed) will. However, in considering any particular provisions in the (claimed) will, you must consider them along with all the other provisions in the will and along with all other evidence relating to the making of the will.

A person (18 years or older and) (of sound mind and) not acting under undue influence may will his or her property to whomever he or she desires. The fact that a will may contain provisions that differ from your idea of what would be proper is not enough to invalidate the will for undue influence.

34:18 CONFIDENTIAL RELATIONSHIP — DEFINED

A confidential relationship exists whenever one person gains the trust and confidence of the other person by acting or pretending to act for the benefit of or in the interest of the other (and, as a result, is put in a position to exercise influence and control over the other).

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76.010 Wills; Generally, Definitions

"Will" means the legal declaration of an individual's testamentary intention regarding that individual's property or other matters. That is, a will is the legal declaration of a person's intention as to the disposition of property or other matters after the person's death. A will includes the will and all codicils to the will. "Codicil" means an amendment to or repudiation of a will. "Testator" means a person who has made a will, especially a person who dies leaving a will. "Beneficiary" means a person, including a trust, who is designated in a will to take an interest in real or personal property. "Executor" means any person nominated in a will who has qualified to administer a testate estate, including a person nominated as alternative or successor executor.

76.100 Wills; Testamentary Capacity; Minimum Age; Conviction of Crime

Every person 14 years of age or older may make a will, unless the person is laboring under some legal disability arising either from a lack of capacity or a lack of perfect liberty of action.

(An individual who has been convicted of a crime shall not be deprived of the power to make a will.)

76.110 Wills; Testamentary Capacity; Decided and Rational Desire; Incapacity to Contract; Insanity; Advanced Age or Eccentricity

Testamentary capacity exists when the testator has a rational desire as to the disposition of property. An incapacity to contract may coexist with the capacity to make a will. An insane individual generally may not make a will except during a lucid interval. A monomaniac may make a will if the will is in no way connected with the monomania. In all such cases, it must appear that the will expresses the wishes of the testator unbiased by the insanity or monomania with which testator is affected. Neither advancing age nor weakness of intellect nor eccentricity of habit or thought is inconsistent with the capacity to make a will.

76.120 Wills; Testamentary Capacity; Freedom of Votition

A will must be freely and voluntarily executed. A will is not valid if anything destroys the testator's freedom of votition, such as fraudulent practices upon the testator's fears, affections, or sympathies; misrepresentations; duress; or undue influence whereby the will of another is substituted for the wishes of the testator.

76.200 Wills; Execution and Attestation; Required Writing; Signing; Witnesses; Codicil

A will shall be in writing and shall be signed by the testator or by some other individual in the testator's presence and at the testator's express direction. A testator may sign by mark or by any name that is intended to authenticate the instrument as the testator's will. A will shall be attested and subscribed in the presence of the testator by two or more competent witnesses. A witness to a will may attest by mark. Another individual may not subscribe the name of a witness, even in that witness's presence and at that witness's direction. A codicil shall be executed by the testator and attested and subscribed by witnesses with the same formality as a will.

76.210 Wills; Execution and Attestation; Knowledge of Contents of Will by Testator

Knowledge of the contents of a will by the testator is necessary to the validity of a will. If the testator can read, the testator's signature or acknowledgment of that signature is presumed to show such knowledge.

76.500 Wills; Probate; Burden of Proof

Upon the trial of an issue arising upon the propounding of a will and a caveat to it, the burden, in the first instance, is upon the proponent of the alleged will to make out a prima facie case by showing the fact of the will and that at the time of the execution of the will, the testator had sufficient mental capacity to make it and, in making it, acted freely and voluntarily. Then the burden of proof shifts to the caveter.
Illinois Pattern Jury Instructions for Undue Influence, and Testamentary Capacity*

200.03 Will Contest—Undue Influence Based Entirely on Unrebutted Presumption Arising from Fiduciary Relationship

To establish undue influence as a ground of invalidity, the plaintiff must prove each of the following propositions:

1. That there was a [[principal-agent], (attorney-client), (other fiduciary relationship arising as a matter of law)] relationship between beneficiary’s name and decedent’s name [relationship between beneficiary’s name and decedent’s name whereby beneficiary’s name exercised dominance over decedent’s name and decedent’s name was dependent upon beneficiary’s name];
2. That decedent’s name reposed trust and confidence in beneficiary’s name;
3. That beneficiary’s name [prepared] [or] [caused the preparation of] the document purporting to be the last will of decedent’s name; and
4. That beneficiary’s name received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to decedent’s name’s bounty.

If you find that each of these propositions has been proved, then your verdict should be that the document is not the valid last will of decedent’s name. If you find that any of these propositions has not been proved, then your verdict should be that the document is the valid last will of decedent’s name [unless the plaintiff has proved one of the other alleged grounds of invalidity].

200.03.05 Meaning of Burden of Proof—Presumption of Undue Influence—Fiduciary Relationship Must be Proved

When I say that a party has the burden of proof on any proposition, or use the expression “if you find,” or “if you decide,” I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

In this case, however, the plaintiff has the burden of establishing that there was a relationship between decedent’s name and beneficiary’s name whereby beneficiary’s name exercised dominance over decedent’s name and decedent’s name was dependent upon beneficiary’s name. To establish this relationship, the proof must be clear and convincing.

200.04 Will Contest—Undue Influence—Proof of Specific Conduct and Presumption from Fiduciary Relationship

The plaintiff may establish undue influence as a ground of invalidity in two ways. First, he may introduce proof of specific conduct alleged to constitute undue influence. If you find that the plaintiff has proved undue influence by evidence of specific conduct, then your verdict should be that the document is not the valid last will of decedent’s name.

Second, he may establish undue influence as a ground of invalidity by proving each of the following propositions:

1. That there was a [[principal-agent], (attorney-client), (other fiduciary relationship arising as a matter of law)] relationship between beneficiary’s name and decedent’s name [relationship between beneficiary’s name and decedent’s name whereby beneficiary’s name exercised dominance over decedent’s name and decedent’s name was dependent upon beneficiary’s name];
2. That decedent’s name reposed trust and confidence in beneficiary’s name;
3. That beneficiary’s name [prepared] [or] [caused the preparation of] the document purporting to be the last will of decedent’s name; and
4. That beneficiary’s name received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to decedent’s name bounty.

If you find that each of these propositions has been proved, your verdict should be that the document is the valid last will of decedent’s name. If you find that the plaintiff has not proved undue influence by evidence of specific conduct, and if you further find that any of these propositions has not been proved, then your verdict should be that the document is invalid.

200.05 Will Contest—Testamentary Capacity—Definition

A person has sufficient mental capacity to make a will if, at the time he executes the document, he has:

1. The ability to know the nature and extent of his property;
Worksheet 7

2. The ability to know the natural objects of his bounty; and
3. The ability to make a disposition of his property in accordance with some plan formed in his mind.

It is not necessary that the person actually know these things. It is necessary only that he have the mental ability to know them.

200.07 Testator’s Right to Dispose of Property

Elsewhere in these instructions I have defined the term[s] ("mental capacity to make a will") and ("undue influence").

If [decedent’s name] had the mental capacity to make a will [and] the document in question was not executed as a result of undue influence], then you must not concern yourselves with the question of whether the decedent made a reasonable or wise disposition of his property. Every person has a legal right to dispose of his property as he sees fit.

However, you may consider the nature of the disposition for the limited purpose of determining [whether decedent’s name had the mental capacity to make a will] [and] [whether the document in question was executed as a result of undue influence].

200.08 Natural Objects of Bounty—Definition

When I refer to the natural objects of one’s bounty, I mean those persons who might reasonably be expected to be his beneficiaries because of family relationship or ties of gratitude or affection.

200.09 Undue Influence—Definition

When I use the expression "undue influence," I mean influence exerted at any time upon the decedent which causes him (her) to make a disposition of his (her) property that is not his (her) free and voluntary act.

200.10 Testamentary Capacity—Personal Characteristics of Decedent

If you believe that decedent’s name [was unable to transact his ordinary business affairs] [had insane delusions] [was eccentric] [held radical or extreme notions or beliefs] [used intoxicating liquor to excess] [used drugs to excess] [had limitations due to advanced age] [suffered from (psychosis) (or) (neurosis)] at the time he executed the document purporting to be his last will, you may consider this together with all the other evidence in determining whether decedent’s name had the mental capacity to make a will.

However, if you find that decedent’s name did have the mental capacity to make a will at the time the document in question was executed, then the fact that he might insert pertinent characteristics would not make the document invalid.

200.11 Testamentary Capacity—Effect of Prior Adjudication of Mental Incapacity

A person who has been declared by a court (to be incompetent) (to be in need of mental treatment) (to be mentally retarded) (to be disabled) [or] [a person who has had a guardian (conservator) appointed to him] can still make a valid will if he has the mental capacity to do so. The tests for mental capacity to make a will are stated elsewhere in these instructions.

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Michigan Non-Standard Civil Jury Instructions for Mental Capacity, and Undue Influence*

10:1 Testator’s Mental Capacity—Consciousness

The contestants claim that the deceased testator was mentally unsound at the time and lacked the mental capacity to make a valid will, due to the effects of the accident on [his/her] mind and memory. They claim that the testator was in a state of coma or semi-consciousness at the time and did not fully know what [he/she] was doing.

The contestants must show that the claimed temporary condition of coma or unconsciousness of the testator, testified to by [name], existed at the time the will was made, and at the very time the will was executed.

Now, if you find that during the last days of [his/her] life, while suffering the injuries from which [he/she] died, the testator was subject to periods of coma or semi-coma, or unconsciousness, and you believe the testimony of [name] to this effect, but you find that later the testator sent for an attorney, and on the arrival of the attorney [he/she] instructed the attorney as to the disposition of the testator’s property after death, had the will read to the testator, insisted on reading it [himself/herself], discussed what pen to use to sign it, and did sign it in the presence of witnesses, and you believe those witnesses, then it is your duty to overrule the contestants’ objections to the will and to allow the instrument presented as the testator’s last will.

10:2 Testator’s Mental Capacity—Mental Illness

As I have already explained to you, mental unsoundness or mental incapacity to make a will does not necessarily involve mental illness. A person may be mentally unsound, may lack the mental capacity to make a will, and yet not be legally mentally ill, and not be a fit subject for the state hospital for the mentally ill or be a person that physicians would certify should be confined because of mental illness.

10:3 Mental Capacity to make Will

In this case, the plaintiff alleges that decedent lacked the necessary capacity to make a last will and testament when the decedent signed the will in question here. On that issue, plaintiff has the burden to prove that, at the time of making that will, the deceased either:

1. Lacked the ability to understand that [he/she] was providing for the disposition of [his/her] property after death; or
2. Lacked the ability to know the nature and extent of that property; or
3. Lacked the ability to know the natural objects of decedent’s bounty; or
4. Lacked the ability to know the manner in which will disposed of decedent’s property.

10:4 Undue Influence

To establish whether undue influence was exerted over the grantor, it must be shown that the grantor was subjected to threats, misrepresentations, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against his inclination and free will. Opportunity, motive, or ability to control are not sufficient in the absence of affirmative evidence that it was exercised.

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§ 20:1. Requirements

IN THE ______ COURT OF ______ COUNTY, MISSISSIPPI ______ JUDICIAL DISTRICT

VERSUS NO. ______

[Plaintiff]

[Defendant]

INSTRUCTION NO. ______

You are instructed that in a will contest, the proponent must show by a preponderance of the evidence that:

1. The testator, ______ [name of testator], acknowledged and declared in the presence of two witnesses that the will was in fact his/her will;
2. The witnesses signed the will in the presence of the testator, ______ [name of testator]; and
3. That the testator, ______ [name of testator], signed the document by signature or made a mark meant as a signature placed anywhere on the document, or expressly directed someone else to sign it in his/her presence and adopted it as his/her signature.

If you find that the proponent, ______ [name of proponent], has shown the above elements by a preponderance of the evidence, then your verdict shall be for the proponent. If, however, you find that the proponent, ______ [name of proponent], has failed to prove any of these elements by a preponderance of the evidence, then your verdict shall be for the contestant, ______ [name of contestant].

§ 20:3. Testamentary capacity

IN THE ______ COURT OF ______ COUNTY, MISSISSIPPI ______ JUDICIAL DISTRICT

VERSUS NO. ______

[Plaintiff]

[Defendant]

INSTRUCTION NO. ______

In order for a document to be a valid will, the testator must have a sound and disposing mind at the time that he or she executed the will. You are instructed that a person has a sound and disposing mind if he is capable of understanding and appreciating in a general way:

1. The nature and effect of his act;
2. The natural objects or persons of his bounty and their relation to him;
3. The nature and extent of his property and his desires concerning its distribution. There is no requirement that a document accomplish a natural, reasonable, or just distribution of the testator’s property.

If you find from a preponderance of the evidence that the testator, ______ [name of testator], had these mental capabilities, then you shall find for the proponent. However, if you find that the testator lacked such capabilities, then you shall find for the contestant, ______ [name of contestant].

§ 20:4. Undue influence

IN THE ______ COURT OF ______ COUNTY, MISSISSIPPI ______ JUDICIAL DISTRICT

VERSUS NO. ______

[Plaintiff]

[Defendant]

INSTRUCTION NO. ______

A will executed by a testator, while under the undue influence of another is invalid. Undue influence is conduct which destroys the testator’s free agency and substitutes the will of another for that of the testator. Every kind of influence which one person has over another is not, in the sense of the law, undue influence. That influence exerted by means of advice, arguments, persuasions, solicitations, suggestion, or entreaty is not undue unless it is so demanding and persistent that it operates to subdue and subordinate the testator’s will and to take away his or her free agency.
Worksheet 9

In order to set aside a will on the ground of undue influence, the evidence must show that the will was not the will of the testator but the will of the other person; in other words, the will of the testator was so dominated and controlled that it became the will of another person. The time when the undue influence is exercised is not necessarily controlling to defeat a will. The undue influence must operate directly on the testator’s mind and control the disposition of property under the will at the time he or she executes the will.

The contestant, [name of contestant], asserts that the will of the testator, [name of testator], should be set aside because the proponent, [name of proponent], unduly influenced the testator in making his/her will. Therefore, if you believe from a preponderance of the evidence that the proponent, [name of proponent], [state essential facts showing undue influence] and thereby substituted his/her will for the will of the testator, [name of testator], or destroyed the free agency of the testator in making his/her will, then your verdict shall be: “We, the jury, find for the contestants.”

However, if you believe from a preponderance of the evidence that the testator, [name of testator], was not unduly influenced in making his/her will but exercised his/her will and acted as a free agent in making his/her will because [state essential facts showing lack of undue influence], then your verdict shall be: “We, the jury, find for the proponent.”

§ 20:5. Influence — The confidential relationship doctrine

IN THE ______ COURT OF ______ COUNTY, MISSISSIPPI ______ JUDICIAL DISTRICT

VERSUS NO. ______

[Plaintiff]

[Defendant]

INSTRUCTION NO. ______

In a will contest where undue influence is an issue, the contestant may proceed on the confidential relationship doctrine. This doctrine does not replace the traditional doctrine of undue influence; it is an alternative approach to the traditional doctrine. A will contestant may establish a confidential relationship by showing the existence of a fiduciary relationship where there is confidence reposed on one side, and the resulting superiority and influence on the other. Proof that the beneficiary in the confidential relationship had been actively concerned in the preparation, procurement, or execution of the will is also necessary. However, there is no requirement that the relationship and duties between the parties be legal; they may be characterized as moral, social, domestic or even personal.

The will contestant has the burden of proving the existence of a confidential relationship. The contestant may show that there were suspicious circumstances in the making of the will or show that the testator depended on the beneficiary due to trust, age, or mental impairment, or active participation by the beneficiary in the procurement or preparation of the will. Once the contestant has met this burden, a presumption arises that the will was the result of undue influence. The proponent must then rebut the presumption with clear and convincing evidence that the testator acted with full knowledge and deliberation, and showed independent consent and action pursuant to independent counsel devoted wholly to the interest of the testator, and that the beneficiary acted in good faith.

The contestant, [name of contestant], asserts that the will of the testator, [name of testator], should be set aside because the proponent, [name of proponent], unduly influenced the testator, [name of testator], through the existence of a confidential relationship between the parties. If you find that a fiduciary relationship existed between the parties where there was confidence reposed on one side and resulted in superiority and influence on the other side, you must find that a confidential relationship existed.

Having found the existence of a confidential relationship, if you then believe that the proponent failed to show, by clear and convincing evidence, that the testator, [name of testator], acted with full knowledge and deliberation and showed independent consent and action, and failed to show that the proponent acted in good faith, you must find for the contestant, [name of contestant].

However, if you believe that the proponent did show, by clear and convincing evidence, that the testator acted with full knowledge and deliberation and showed independent consent and action, and that the proponent acted in good faith, you must find for the proponent, [name of proponent].

Missouri Approved Jury Instructions, Civil for Sound Mind and Undue Influence*

15.01 Definition—Sound and Disposing Mind and Memory

The phrase "sound and disposing mind and memory" as used in this [these] instruction [s] means that when a person signs a [will] or [codicil] that person:

First, was able to understand the ordinary affairs of life, and
Second, was able to understand the nature and extent of that person's property, and
Third, was able to know the persons who were the natural objects of that person's bounty, and
Fourth, could intelligently weigh and appreciate that person's natural obligations to those person's.

15.02 Definition—Undue Influence

The phrase "undue influence" as used in this [these] instruction [s] means such influence as destroys the free choice of the person making the [will] or [codicil] [contested part of the will].

15.03 Burden of Proof

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true.

The burden is upon defendant, proponent, to cause you to believe that the document dated ______ is the last will and testament [codicil] of name of testator.

The burden is on the plaintiff, contestor, to cause you to believe (here insert affirmative defenses raised such as "his claim of undue influence as submitted in Instruction Number ______").

In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence.

1 If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

15.06 Verdict Directing—Partial Invalidity of Will due to Undue Influence

In your verdict, you must find that the contested part of the last will and testament of name of testator providing for (here insert description of the challenged portion of the will) is not valid if you believe that name of testator included the contested part of the will as a result of undue influence of here insert the name of the person who allegedly exerted the undue influence.

15.08 Affirmative Defense—Undue Influence

Your verdict must be that the document in issue is not the last will and testament of name of testator if you believe that name of testator signed the document as a result of the undue influence of here insert the name of the person who allegedly exerted the undue influence.

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NJ2d Civ. 16.04 Testamentary Capacity—Definition

In Instruction No. __________, I said that one of the things (proponent) has to prove is that when (deceased) executed Exhibit No. __________ (he, she) had what the law calls “testamentary capacity.”

People have testamentary capacity if they:
1. Know the nature of (their acts, the act of making and executing a Will, the nature of their acts in making and executing a Will);
2. Know the nature and extent of their property;
3. Know the proposed disposition of their property; and
4. Know the natural objects of their bounty.

Testamentary capacity is not necessarily the same as medical soundness of mind. People may be rational upon one or more subjects and still not have testamentary capacity. And they may have testamentary capacity even though they (are elderly, are ill, are unable to transact some business affairs, have peculiar habits, are eccentric, are slowwitted, are subject to delusions or other mental or physical infirmities, have an impediment of speech, have a weak understanding, et cetera). You may consider any evidence of these things among all of the other evidence in the case, when deciding whether (deceased) had testamentary capacity when (he, she) executed Exhibit No. __________.

NJ2d Civ. 16.05 Testamentary Capacity—Time When Important

To make a valid Will, a person has to have testamentary capacity when (he) (she) signs (his) (her) Will, not at any other time.

In this case, there is evidence of (deceased)’s mental condition at times other than the time [it is claimed] (he) (she) signed Exhibit No. __________. You may consider that evidence only in so far as it is relevant to deciding whether (he) (she) had testamentary capacity at the time [at which it is claimed] (he) (she) signed Exhibit No. __________.

NJ2d Civ. 16.06 Undue Influence—Statement of the Claim

A. ISSUES

(Contestant) claims that Exhibit No. __________ is not the valid Will of (deceased) because (here insert the name or other identification of the appropriate person or group) exerted undue influence over (deceased).

(Proponent) admits (here state what proponent admits, by pleading or otherwise, if anything).

(Proponent) denies (here state what proponent denies).

B. BURDEN OF PROOF

In connection with this claim of undue influence, the burden is on (contestant) to prove by the greater weight of the evidence each of the following:
1. That (deceased) was (a person who would be subject to, susceptible to) undue influence;
2. That there was an opportunity to exercise undue influence upon (deceased);
3. That there was a (disposition to exercise, motive for exercising) undue influence upon (deceased); and
4. That Exhibit No. __________ was the result of such undue influence.
C. EFFECT OF FINDINGS

If (contestant) has met this burden of proof on (his, her) claim of undue influence, then your verdict must be that Exhibit No. ________ is not the valid Will of (deceased).

If (contestant) has not met this burden of proof on (his, her) claim of undue influence, you must disregard the claim of undue influence and [(your verdict must be that Exhibit No. ________ is the valid Will of (decedent), you must turn your attention to the other issues in these instructions)].

NJ12d Civ. 16.07 Undue Influence—Definition

"Undue influence" is influence that overpowers a person’s mind and destroys that person’s free choice in regard to the act of making a Will; it causes (him, her) to express the will of another rather than (his, her) own. The controlling factor is the effect of the influence on the mind of the person making the Will [rather than the means employed, or the extent or degree of the influence exerted, or the identity of the person exerting the influence].

[The fact that a person has a motive and an opportunity to exert influence upon a person making a Will is not enough by itself to establish undue influence.]

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Ohio Jury Instructions for Due Execution, Testamentary Capacity, and Undue Influence

633.01 Wills, issue, burden

1. DEFINITIONS.

(a.) WILL. A will (last will and testament) is a written instrument executed with the formalities required by the Ohio Revised Code whereby a person makes a disposition of his property to take effect after his death.

(b.) TESTATOR. A person who dies leaving a will is said to have died testate and is referred to as testator if a male, and as testatrix if a female.

(c.) PROBATE. Probate is a court procedure by which a will is proved to be valid or invalid.

2. LEGAL REQUIREMENTS OF WILL. There are certain legal requirements set forth in the Ohio Revised Code that must be met for a will to be valid. They are:

(a.) The person must be 18 years of age or older;

(b.) The person must be of sound mind and memory;

(c.) The person must not be under restraint.

3. ADMISSION TO PROBATE. For a will to be admitted to Probate it:

(a.) Must be in writing;

(b.) Must be signed at the end by the testator (party making it) (some person at the testator’s request and in his presence) in the presence of at least two witnesses (signed at the end by the testator who later acknowledges his signature to at least two witnesses).

4. OPTIONAL. In this case the parties agree, and there is no dispute that the testator signed (in the presence of at least two witnesses) (and later acknowledged his signature to at least two witnesses).

5. DISPOSITION OF PROPERTY. Even though a will is admitted to Probate, it does not mean it validly disposes of the property of the testator according to his wishes.

6. ISSUE. The plaintiff(s) claims that the testator (was not of sound mind or memory) (was under restraint) and therefore the will is not valid and should be set aside. The issue in this case for you to decide is whether the will of admitted to Probate is valid. You must decide if the testator was (not of sound mind and memory) (was under restraint).

633.03 Mental Capacity, capacity to make a will, sound mind and memory

1. GENERALLY. In determining the soundness of the mind and memory of the testator, the law does not undertake to determine the level of a person’s intelligence nor to define the exact quality of mind and memory which a testator must possess at the time a will is made.

2. ELEMENTS. However, the law requires:

(a.) That the testator understand that he is making a will to dispose of his property at death.

(b.) That the testator understand generally the nature and extent of his property.

(c.) That the testator have in his mind the names and identity of those persons who are his relatives, next-of-kin, or the natural objects of his bounty and understand his relationship to them.

3. MENTAL CAPACITY REQUIREMENTS. A testator is not required to have sufficient mental capacity to make a contract or to conduct normal business affairs. He must, however, have a sufficiently active mind and memory to understand the three conditions just given to you. He must be able to remember them a sufficient length of time to consider their obvious relations to each other, and to be able to form a rational judgment with reference to them, even though he may not be able to understand and appreciate these matters as well as a person who has vigorous health, in both mind and body. It is not necessary that he be aware of these three conditions and have them in his mind at all times, since his health and mental condition may vary from time to time. But he must have them in mind during the time that he signs the will.

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Worksheet 12

633.05 Under restraint (undue influence)

1. ELEMENTS. Being under restraint and being subject to undue influence are one and the same. The essential elements of undue influence are:

(a.) A testator is a person who is or can be influenced by reason of advanced age, physical infirmities, mental condition, fear, or for any other reason would yield to the desire or will of another person or persons;

(b.) The opportunity for a person or persons to exert it;

(c.) The fact of improper influence exerted or attempted;

(d.) A will showing the effect of such influence.

2. GENERAL INFLUENCE. General influence, however strong or controlling, is not undue influence unless it is brought to bear directly upon the act of preparing the will and imposes another person’s plans or desires upon the testator. If the will, as finally executed, expresses the free and voluntary plans and desires of the testator, the will is valid, regardless of the exercise of influence.

3. UNDUE INFLUENCE. Undue influence sufficient to invalidate a will is that which substitutes the plans or desires of another for those of the testator. The influence must be such as to control the mind of the testator in the making of his will, to overcome his power of resistance, and to result in his making a distribution of his property which he would not have made if he were left to act freely and according to his own plans and desires.

4. UNDUE INFLUENCE (ADDITIONAL). The mere existence of undue influence or an opportunity to exercise it, although coupled with interest or motive to do so, is not sufficient to invalidate a will. Such influence must actually be exerted on the mind of the testator with respect to the execution of the will in question. It must be shown that the undue influence resulted in the making of a will containing the disposition of property that the testator would not have otherwise made.

5. ALTERNATIVE. To invalidate a will, the undue influence exercised must overpower and control the mind of the testator so as to destroy his freedom of thought, and force him to express the plans and desires of another rather than his own. The mere presence of influence is not sufficient. Undue influence must be present and effective at the time of the execution of the will, causing the testator to make a disposition of his property which he would not otherwise have made.

633.07 Conclusion or Summary

1. The fact that a person who has the capacity to make a will disposes of his property in an unnatural manner, or unjustly, or not equally and at variance with earlier statements by the testator concerning his relatives or next-of-kin, or the natural objects of his bounty, does not invalidate his will unless the contestants prove by the greater weight of the evidence that the testator was not of sound mind and memory or that undue influence was actually exercised on the testator at or prior to the time of the making of the will, and that such (lack of mental capacity) (undue influence) was in operation at the time of the execution of the will, and that the (lack of mental capacity) (undue influence) (resulted in a) (was used for the purpose of obtaining, producing or coercing a) will in favor of particular individuals.

2. CONSIDER. You have the right to consider evidence tending to show that the will was just or unjust, reasonable or unreasonable, natural or unnatural; the value and nature of testator’s estate; financial condition of those who might naturally expect to be beneficiaries at the time this will was made, and any other factors that you find from the evidence, in determining whether, at the time of the execution of the will, the testator was (of sound mind and memory sufficient to legally execute a) will (under restraint or subject to undue influence).

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Worksheet 13

Sample Petition for Revocation of Probate — Florida — Alleging Lack of Testamentary Capacity and Undue Influence

Note: This form is for illustrative purposes only. Careful consideration of the client’s circumstances and the effect of local laws and rules is essential.¹

IN THE CIRCUIT COURT FOR BROWARD COUNTY, FLORIDA PROBATE DIVISION, IN RE: ESTATE OF

[Testator],
Deceased.

/ ____________________________ / ____________________________
[Contestant 1] and [Contestant 2],
Petitioners
v.

[Proponent],
Respondent

File No. ____________________________

Adversary Proceeding No. ____________________________

PETITION TO REVOKE PROBATE OF WILL

Petitioners, [Contestant 1] and [Contestant 2], allege as follows:
1. Petitioner, [Contestant 1], a resident of New York, New York, is the sister of the decedent, [Testator] ("the decedent").
2. Petitioner, [Contestant 2], a resident of Fort Lauderdale, Florida, is the niece of the decedent. Contestant 2’s mother, who died on January 1, 2004, was decedent’s only other sister.
3. The decedent died on December 17, 2013, a resident of Fort Lauderdale, Florida.
4. On January 23, 2014, a writing dated July 1, 2013 purporting to be the decedent’s will was admitted to probate by this Court.
5. By Order dated January 23, 2014, Respondent, [Proponent] was appointed personal representative of the Estate of [Testator] pursuant to Article X of the purported will.
6. Respondent, a resident of Fort Lauderdale, Florida, is the only brother of the decedent, and is the sole beneficiary named in the purported will.
7. The decedent was never married, and she had no children.
8. Petitioners and Respondent are the intestate heirs of the decedent, the decedent’s mother and father both having died in 1987 and there having been no other brothers or sisters of the decedent.
9. Petitioners are unaware of any other purported will of the decedent.
10. In the absence of a valid will, Petitioners are the intestate heirs of two-thirds of the decedent’s estate.
11. The purported will dated July 1, 2013, is not a valid will, and its probate should be revoked because on July 1, 2013, the decedent lacked the testamentary capacity to execute a will; the decedent lacked the mental capacity to understand or bear in mind the nature and extent of her property and the natural objects of her bounty, and decedent lacked the mental capacity to understand the practical effect of the purported will.
12. The purported will dated July 1, 2013, is not a valid will, and its probate should be revoked because the purported will is not the true will of the decedent; it is an instrument actively procured through the undue influence of Respondent while the decedent was suffering from a cancerous brain tumor and was heavily medicated, as evidenced by the following:
   (a) Respondent enjoyed a confidential relationship with the decedent;
   (b) Respondent held the decedent’s general power of attorney and health care surrogate designation;
   (c) Respondent made all decisions regarding the decedent’s medical treatment and hospitalizations;
   (d) For several months prior to the death of the decedent, Respondent prevented Contestant 2 from visiting the decedent at decedent’s home and, on numerous occasions, prevented both Petitioners from speaking with the decedent by telephone;
   (e) Respondent accompanied the decedent to the drafting attorney’s office for consultations regarding the purported will, was present during conferences with the attorney, and knew the contents of the will prior to the execution thereof;

¹ The authors thank Barbara Landau, Esq., for her assistance in preparing this sample petition, the sample interrogatories, and the sample order revoking probate of a will. Ms. Landau is an Associate Professor, in the Master of Accounting and Master of Taxation programs at Nova Southeastern School of Business and Entrepreneurship at Nova Southeastern University. Ms. Landau, who received her L.L.M. in Taxation from N.Y.U., served as a staff attorney for the Seventeenth Judicial Circuit, Broward County, Florida, Probate Division, for several years. She is a member of the Florida Bar, the New Jersey Bar, and the New York Bar.

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Worksheet 13

(f) Respondent accompanied the decedent to the attorney's office for the execution of the will;

(g) Respondent retained possession of the original of the purported will; and

(h) Respondent kept the execution of the purported will a secret from the Petitioners.

13. On July 1, 2013, the decedent was suffering from a cancerous brain tumor, which rendered her incapable of having the requisite testamentary capacity and rendered her prey to undue influence by Respondent.

14. On July 1, 2013, the decedent was heavily medicated which rendered her incapable of having the requisite testamentary capacity and rendered her prey to undue influence by Respondent.

15. There are no persons other than the Petitioners and the Respondent who have an interest in this proceeding.

16. As a result of Respondent's actions, it became necessary for Petitioners to obtain the services of attorneys and to incur attorney's fees and costs.2

WHEREFORE, Petitioners demand that the probate of the purported will dated July 1, 2013, be revoked, and that legal fees and costs be awarded to Petitioners and be allocated to and paid out of any share of the Respondent.

2 As Petitioners have no interest under the will that they are challenging, no statement has been included regarding renunciation of any devise or interest under the will. However, in those cases where the petitioners have an interest, they must include in the petition a statement that they renounce all interests under the will as a condition to contesting the will. The renunciation is a qualified renunciation, and it is recommended that the Petition state that the renunciation is a qualified renunciation under Florida case law. In preparing any such Florida petition, practitioners should consult the Florida statutes and the rules, including the following: Fla. Stat §§ 733.100 and 733.109; Florida Probate Rule 3.023; 5.080 and Rule 5.270, and the Florida Rules of Civil Procedure as made applicable through Florida Probate Rule 3.080.
Interrogatories of Contestants Directed to Proponent — Florida

Note: This worksheet is for illustrative purposes only. Careful consideration of the client’s circumstances and the effect of local laws and rules is essential.

1. Please state your name and the name of each person you consulted or who assisted you in the preparation of your answers to these Interrogatories, specifying for each such person the Interrogatory number with respect to which such person was consulted or assisted you.

2. With respect to the purported will dated July 1, 2013, did you ever discuss with the decedent or any other person, including anyone from the office of the decedent’s attorney, the provisions of the purported will, and if so, state with whom, and set forth the dates, locations, and subject matter of the discussions, and the names of any other persons who were present.

3. Set forth the dates of any meetings and the subject matter of any discussions between the decedent and her attorney regarding the provisions of the purported will at which you were present.

4. Indicate who was present at the execution of the purported will.

5. On what date did you first know of the contents of the purported will?

6. On what date did you first obtain possession of the original of the purported will dated July 1, 2013?

7. Do you know of, or did you ever have possession of, any other wills or codicils that the decedent may have had and, if so, state the date or dates of such wills or codicils and their provisions, and whether or not you are aware of the whereabouts of any other wills or codicils that the decedent may have had.

8. State whether you ever had any conversations or written communications with any persons other than those set forth above regarding any will or codicil of the decedent and, if so, state the date or dates of those discussions, the nature of any written correspondence, the names and addresses of the persons present or who received or sent such written communications, and the subject matter of each such discussion or written communication.

9. In the five-year period preceding the death of the decedent, did you ever have any conversations with the decedent regarding the existence of any other will or codicil or their provisions and, if so, provide the substance of each such conversation and the names of any persons other than you or the decedent who were present during such conversations.

10. State whether you advised any person of the existence, contents or location of the purported will dated July 1, 2013 prior to the decedent’s death and, if so, indicate who you advised, the date, and whether oral or in writing, and, if oral, indicate the contents of your statement.

11. State whether the decedent ever gave you any gifts worth more than $50.00 and, if so, state the nature and value of each gift and the date of each gift.

12. State whether, in the five years immediately preceding the death of the decedent, any assets were held jointly by you and the decedent and, if so, indicate the nature and location of the asset.

13. State whether, in the five years immediately preceding the death of the decedent, any assets were held by the decedent in trust for you and, if so, indicate the nature of the trust, and the nature and location of the assets, the trustee, and the name of any bank or broker.

14. Describe any bank accounts, certificates of deposit, savings accounts, securities accounts, or other assets of the decedent to which you had access or over which you had power of attorney, and state whether you had any other fiduciary relationship with the decedent, and the date or dates such fiduciary relationships were established, including for all powers of attorney, health care surrogate designations and similar instruments.

15. With respect to each instrument listed in Interrogatory Number 14, provide the names of the persons who prepared each such instrument and the names of all persons who were provided copies of each such instrument, and state whether or not any such instrument was revoked by the decedent.

16. List all financial accounts of any nature, including account numbers and the names and addresses of the financial institution where maintained, for all accounts in the name of the decedent or in which the decedent had an interest in the five years immediately preceding the death of decedent.

17. With respect to all accounts listed in Interrogatory Number 16, set forth the names and addresses of all persons who had an interest in each such account and set forth the interest of each person.

18. If you purchased any property from the decedent in the five years immediately preceding the death of the decedent, indicate as to each such purchase the date of purchase, the nature of the property purchased, state whether there was a contract for sale and/or instruments of transfer involved, the amount paid by you, and the name of the attorneys preparing any such instruments or providing advice in connection with said purchase or purchases.

19. Set forth any other business transactions of any nature that you had with the decedent in the five years immediately preceding the death of the decedent.

20. If the decedent ever made any loans to you, state the date and amount of such loans, the duration of said loan, the amount of interest, and the current outstanding balance on each such loan.

21. In the five years immediately preceding the death of the decedent, indicate how many times you visited the decedent, providing as to each visit, the approximate dates, duration and location.
Worksheet 14

22. In the five years immediately preceding the death of the decedent, indicate how often you spoke with the decedent by telephone.

23. Provide the names of all the hospitals to which the decedent was admitted in the two years immediately preceding her death and the dates of each such admission.

24. Provide the names of all of physicians who treated the decedent or with whom the decedent consulted during the three-year period immediately preceding the death of the decedent.

25. State the name and address of all persons who have knowledge of any facts or who have information relevant to any issue involved in this action, including the medical condition of the decedent on July 1, 2013.

26. State whether any written or recorded or any oral statements have been given by any person to you or your attorneys regarding any issue involved in this action, and if so, indicate as to each statement, whether same was written, video or audio recorded, or oral, the name and address of the person making the statement, the date the statement was given, and whether or not a copy of the statement was provided to the person who made the statement, and if oral, provide the contents of the statement.

27. State the name of all experts, including any medical doctors or other physicians, with whom you have consulted regarding any of the issues involved in this action, and state the name, address and telephone number of each such person.

28. List all of your employers in the five years immediately preceding the decedent’s death, including the address, dates of employment, title, responsibilities, salary and reasons for leaving.
Sample Order Revoking Probate of Will — Florida

Note: This form is for illustrative purposes only. When preparing a proposed Order for the Court, the attorney should draft it carefully to ensure that the Order includes all necessary information.

IN THE CIRCUIT COURT FOR BROWARD COUNTY, FLORIDA PROBATE DIVISION,
IN RE: ESTATE OF

[Testator],
Deceased.

______________________________
File No. __________

[Contestant 1] and [Contestant 2],

Petitioners
v.

[Proponent],
Respondent

______________________________
Adversary Proceeding No. __________

ORDER REVOKING PROBATE OF WILL

On the Petition to Revoke Probate of the will of Testator, the decedent, dated July 1, 2013, on the ground that the decedent lacked the testamentary capacity to execute a will and that the will was the product of undue influence, the Court finding that all interested persons have been served proper notice of this hearing or have waived notice, and having heard argument of counsel and the testimony of Petitioners, Respondent, and other witnesses, it is:

1. Adjudged that the greater weight of the evidence establishes that the decedent was not competent to make a testamentary disposition on July 1, 2013. The testimony of several of the decedent’s physicians that the decedent suffered from a cancerous brain tumor which prevented the decedent from understanding the nature and extent of her property, the natural objects of her bounty, and the practical effects of the dispositions in the will.

2. Adjudged that Petitioners established the presumption of undue influence by showing that Respondent had a confidential relationship with the decedent, was active in the procurement of the will, and that Respondent was a substantial beneficiary under the terms of the will. The Respondent did not meet his burden of proving lack of undue influence. The greater weight of the evidence establishes Respondent unduly influenced the decedent to execute her will dated July 1, 2013.

IT IS THEREFORE ORDERED, on this ___ day of _______, 20__, that the Petition to Revoke Probate of the Testator’s will dated July 1, 2013, is hereby granted.

______________________________
Circuit Court Judge
BIBLIOGRAPHY AND REFERENCES

Text and Treatises
Dukeminier & Sitkoff, Wills, Trusts, and Estates (9th ed. 2013).
Restatement (Second) of Property (1999).
Restatement (Third) of Property (1999).
Unif. Probate Code (Original).
Unif. Probate Code (Revised).

Periodicals

1987

1991

1992
Beyer, "Drafting in Contemplation of Will Contests," 38 Proc. Law 61 (Jan.).
McGarry, "Videotaped Wills: An Evidentiary Tool or a Written Will Substitute?" 77 Iowa L. Rev. 1187.

1994
Huffaker & Novakovic, "How to Determine If a Client Has Testamentary Capacity," 23 Est. Plan. 323 (Nov./Dec.).
Johns, "Will Execution Ceremonies: Securing a Client's Last Wishes," 23 Colo. Law. 47 (Jan.).

1995

1996
Bennett, "Protecting Your Client's Estate Plan from Litigators and Other Predators: Pre-Mortem Planning to Ease Post-Mortem Administration," ABA Sec. of Real Property, Probate and Trust Law, 7th Annual Spring CLE and Committee Meeting, Probate and Trust Programs.
Hill, "Post-Mortem Considerations in Contesting a Will," ABA Sec. of Real Property, Probate and Trust Law, 7th Annual Spring CLE and Committee Meeting Probate and Trusts Programs.
Hirsch, "Inheritance and Inconsistency," 57 Ohio St. L.J. 1057.

1998

1999
Simpson, "Avoiding a Will Contest: Estate Planning and a Legislative Solution," 37 Houston L. 36 (July/Aug.).

2000

2003

2005

2007

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ISBN 978-1-61746-848-0
Bibliography and References

2008

Clowry, "In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking," 43 Real Prop. Tr. & Est. L.J. 27 (Spring).

Orth, "Wills Act Formalities: How Much Compliance is Enough?" 43 Real Prop. Tr. & Est. L.J. 73 (Spring).

2012


2013

Brashier, "The Ghostwritten Will," 93 Boston Univ. L. Rev. 1803 (Dec.).

Bucher, Simon and Reiser, "The Best Defense is a Good Offense," 152 N.Y. St. L. Rev. No. 3, 17 (Mar.).


Rycinar and Devauch, "Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests," 14 Rev. L.J. No. 1, 1 (Fall).