THE WILL EXECUTION CEREMONY—HISTORY, SIGNIFICANCE, AND STRATEGIES

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I. INTRODUCTION

One of the most important phases of a client's estate plan is the will execution ceremony—the point at which the client's desires regarding the distribution of his[1] property upon death are formalized. Unfortunately, this key event is frequently handled in a casual and even sloppy manner. Some attorneys merely mail or hand-deliver unexecuted wills to testators along with instructions for getting them executed.[2] Not only may an unprofessional or unsupervised ceremony disappoint the client, it may also cause the will to be invalid.[3] Obviously, this frustrates the client's intent and may even expose the attorney to malpractice liability.

Although estate planning is a distinct legal specialty,[4] a large number of wills are prepared by the general practitioner.[5] Unfortu-

1. Since phrases like "his or her," "he or she," and "testator or testatrix" tend to disrupt the continuity of this article, the decision was made to use words importing the masculine gender. No gender bias is intended, nor should one be inferred from this decision.

2. *See* Hamlin v. Bryant, 399 S.W.2d 572 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.) ("After she [attorney] finished getting instructions from him [testator] as to details, she drew up a simple will instructing him how to get it signed before witnesses who had known him for quite some time. She gave him these instructions orally. After the will was prepared, she mailed it to him."). *Id.* at 575. "Mailing the will to the client for execution is never advisable" absent "circumstances where execution of the will under the attorney's supervision is impossible." Johanson, *Chapter 10: Wills and Trust Drafting*, CAPITAL EST. PLAN. COMMENTARY 13 (Dec. 1978). *See also* Adams & Abendroth, *Malpractice Climate Heats Up for Estate Planners*, 126 TR. & EST. 41, 44 (April 1987) (suggested procedures if will sent to client for execution); J. PRICE, CONTEMP. EST. PLAN. § 1.9, at 26 (1983) (attorney should not entrust document execution to client because client may alter or improperly execute document).

3. *See* Johanson, *Chapter 10: Wills and Trust Drafting*, CAPITAL EST. PLAN. COMMENTARY 11 (Nov. 1978) (lack of ceremony may cause invalid will or jeopardize probate); 1 J. SCHOULER, LAW OF WILLS, EXECUTORS AND ADMINISTRATORS § 257, at 319 (5th ed. 1915) (intended will ineffective unless executed with required formalities). *See generally* Nelson & Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPPERDINE L. REV. 331 (1979) (history of struggle to effectuate testator's intent in light of statutory formalities); Comment, *Attestation of Wills—An Examination of Some Problem Areas*, 11 S. TEX. L.J. 125 (1969) (problems involved with conscious presence rule, place of signatures, and order of signing).

4. The Texas Bar through its Board of Legal Specialization has recognized this by providing for attorneys to become Board certified in Estate Planning and Probate Law.

5. *See* Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA

nately, neither the specialist nor the generalist always conducts proper will execution ceremonies.[6] After a brief description of the history of will execution ceremonies, this article details the critical importance of the ceremony and provides a comprehensive step-by-step format for proper will execution.

II. HISTORICAL OVERVIEW OF WILL CEREMONIES

Since the earliest recognition of the power of testation,[7] some type of ceremony has accompanied the exercise of that power.[8] Will ceremonies have helped demonstrate that the testator was not acting in a casual, haphazard, whimsical, or capricious manner[9] by furnishing proof that the testator deliberated about his testamentary desires and had a fixed purpose in mind when making the will.[10] The ceremonies also have provided evidence that the will was actually made by the testator, by impressing the act on the minds of witnesses.[11]

The earliest accounts of will execution ceremonies appear in the Book of Genesis.[12] Whenever a patriarch was old and dying, he would

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L. REV. 751, 760 (1978) ("Even today, the last will still belongs largely to the general practitioner."). A recent survey conducted by a media-market research firm on behalf of the American Bar Association Journal revealed that 33.1% of lawyers surveyed practice estate planning, probate and trust law. Blodgett, *Time and Money: A Look at Today's Lawyer*, 72 A.B.A. J. 47, 51 (Sept. 1986).

6. *See* Becker, *supra* note 5, at 759 ("comparatively few lawyers recognize the expertise and particular talents essential to estate planning").

7. Testation is the power "to transfer property at the death of its owner, without the creation of any ownership interest in the grantee until the owner's death, and with a retained ability in the donor to change his mind." T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 70 (2d ed. 1979).

8. *See generally* T. ATKINSON, THE LAW OF WILLS §§ 2-3 (2d ed. 1953) (history of succession and testation in the ancient world and in England); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 534-95 (5th ed. 1942) (account of development of testation in England); 1 PAGE ON THE LAW OF WILLS §§ 2.1-.18 (W. Bowe & D. Parker ed. 1960) [hereinafter PAGE] (history of wills among primitive peoples and under pre-Roman, Roman, Germanic, Norwegian, English, and American law); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 128, 314-56 (2d ed. 1968) [hereinafter POLLOCK & MAITLAND] (development of testation in England); J. ROOD, A TREATISE ON THE LAW OF WILLS §§ 9-12, 215-18 (2d ed. 1926) (testation under English law); 1 J. SCHOULER, *supra* note 3, §§ 12-16 (development of testation in civilized world).

9. Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941); Nelson & Starck, *supra* note 3, at 348, 351.

10. J. ROOD, *supra* note 8, § 215.

11. *Id.*

12. *See generally* J. ROOD, *supra* note 8, § 11; 1 J. SCHOULER, *supra* note 3, § 13 (besides examples described in text, also suggests that Noah made a written testament, witnessed under seal, disposing of entire world). *But see* T. ATKINSON, *supra* note 8, § 2, at 7 ("In the Book of Genesis there are several signs of testamentary distribution, but the text does not enable us to decide whether these arrangements were fully testamentary according to modern concepts.").

have the beneficiaries gather around him to receive his blessing. This blessing was, in effect, a testamentary disposition by which the patriarch transmitted property to his children at his discretion.[13] For example, when Isaac was preparing to die, he told his eldest son, Esau, to prepare Isaac's favorite meal.[14] Taking advantage of Isaac's poor eyesight[15] and a disguise,[16] Isaac's younger son Jacob convinced Isaac that he was Esau.[17] After eating, Isaac told his son to kiss him, and then Isaac gave his blessing to Jacob.[18] When Isaac discovered the error, he refused to correct it.[19] "This indicates how much solemnity was attached to the death-bed utterances by the patriarch who made them."[20]

Later in Genesis, Joseph learned of Israel's (his father) failing health and thus took his two sons, Manasseh and Ephraim, to their grandfather to receive his blessing.[21] Israel first kissed and hugged each of the boys.[22] He then placed his right hand on the head of the boy whom he wanted to receive the largest gift and his left hand on the other boy's head while giving the blessing.[23]

Beginning with the Fourth Egyptian Dynasty, approximately 2900—2750 B.C., there is evidence of will ceremonies remarkably similar to those of modern day.[24] For example, a ceremony conducted in 2548 B.C. involved an instrument written on papyrus and witnessed by two scribes.[25]

In early Roman times, there were two methods of making a will and each had its own formalities. The first of these methods involved the testator making his will by a declaration in front of one of the assemblies of the people called the *comitia calata*.[26] Originally, the consent of the assembly was needed, but as time went on the ceremony was basically required only for publicity.[27] The second method was used by soldiers in

13. 1 J. SCHOULER, *supra* note 3, § 13, at 12.
14. *Genesis* 27:1-4.
15. *Genesis* 27:1.
16. *Genesis* 27:15-16.
17. *Genesis* 27:23.
18. *Genesis* 27:25-29.
19. *Genesis* 27:32-38.
20. 1 J. SCHOULER, *supra* note 3, § 13, at 12 n.8.
21. *Genesis* 48:1.
22. *Genesis* 48:10.
23. *Genesis* 48:12-20.
24. *See* T. ATKINSON, *supra* note 8, § 2, at 7; 1 PAGE *supra* note 8, § 2.4; J. ROOD, *supra* note 8, § 12 (wills from reign of Amenemhat III so nearly resemble those currently used that "you might almost suppose they were drawn yesterday").
25. T. ATKINSON, *supra* note 8, § 2, at 7.
26. *See* 1 PAGE *supra* note 8, § 2.5. This type of will was called the *testamentum calatis comitiis*. *Id*. *See also* T. ATKINSON, *supra* note 8, § 2, at 8.
27. *See* T. ATKINSON, *supra* note 8, § 2, at 8; 1 PAGE *supra* note 8, § 2.5.

battle.[28] Soldiers could make their wills by orally declaring their testamentary desires to their comrades.[29]

As Roman law evolved, a new type of will developed. This will was called a testament " 'with the copper and the scales' " and was "in effect a sale by the owner to his intended successor in the presence of five witnesses and a balance holder to weigh the price paid by the grantee to the grantor."[30] As the substantive Roman law of wills continued to change, the changes were followed by corresponding changes to the ceremony.[31]

The power of testation had a long and complicated, but interesting, development in England.[32] In the Anglo-Saxon era there were two types of dispositions which imperfectly performed the function of a will: the post obit gift and the deathbed disposition.[33] Each of these dispositions had a ceremony. For example, the deathbed disposition was typically made under the supervision of a priest and was done in conjunction with the testator's last confession.[34] Later in the Anglo-Saxon era these two types of dispositions merged in the *cwide*.[35] The *cwide* had several ceremonial-type requirements such as being in writing, obtaining prior consent of the king, getting a bishop to set his cross to the document, and executing the document in duplicate or triplicate.[36]

After the Norman conquest and until 1540 when the Statute of Wills was enacted, the power of testation developed along two separate lines: the royal courts dealt with real property while the church courts were concerned with personal property.[37] There appears to have been a diminished concern about a formal ceremony connected with testamen-

28. 1 PAGE *supra* note 8, § 2.5. This type of will was called *testamentum in procinctu*. *Id*.

29. *Id*.

30. T. ATKINSON, *supra* note 8, § 2, at 8. *See also* 1 PAGE, *supra* note 8, § 2.5, at 37; J. ROOD, *supra* note 8, § 215.

31. *See* T. ATKINSON, *supra* note 8, § 2, at 9 (as law changed, ceremonies required witnesses to sign and seal the will; contents of will became secret). *See also* 1 PAGE, *supra* note 8, § 2.5, at 37 (signature of testator added as requirement).

32. *See* T. ATKINSON, *supra* note 8, § 3; 3 W. HOLDSWORTH, *supra* note 8, at 534-95; 1 PAGE, *supra* note 8, §§ 2.7-.17; 2 POLLOCK & MAITLAND, *supra* note 8, at 314-56; *see also* Nelson & Starck, *supra* note 3, at 332-45 (excellent discussion of development of formalities under English law).

33. *See* T. ATKINSON, *supra* note 8, § 3, at 12; 2 POLLOCK & MAITLAND, *supra* note 8, at 319.

34. *See* T. ATKINSON, *supra* note 8, § 3, at 12; 2 POLLOCK & MAITLAND, *supra* note 8, at 319.

35. *See* T. ATKINSON, *supra* note 8, § 3, at 12; 2 POLLOCK & MAITLAND, *supra* note 8, at 319.

36. 2 POLLOCK & MAITLAND, *supra* note 8, at 320-21.

37. *See* T. ATKINSON, *supra* note 8, § 3, at 13.

tary dispositions during this time.[38] Nonetheless, there is evidence that impressive ceremonies were followed on occasion.[39] In one account, the testator and monks gathered in a church. After prayers for the dead were completed, in a ceremony which probably included candle lighting and chanting, the testator made a devise of land upon a portable altar which had been dedicated by a rod to the Holy Trinity.[40]

With the passage of the Statute of Wills in 1540 governing the devisability of land,[41] the formalities required for a valid will, and hence the contents of the will execution ceremony, became clearer.[42] Originally, the requirements were simple. The instrument had to be in writing, but no attesting witnesses were needed and the will did not even have to be signed or written by the testator.[43]

When the Statute of Frauds was enacted in 1676,[44] the writing requirement was extended to include most bequests of personal property, and additional requirements were added to devises of real property.[45] Section 5 of the Statute added many of the formal requirements which are familiar today: "[A devise of land] 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 devisor by three or four credible witnesses. . . ."[46]

It is at this point in history that much of the common law regarding wills came to the United States.[47] Each state then made whatever alterations it saw fit to the requirements which needed to be satisfied for a successful exercise of the power of testation. Nonetheless, the development of wills law in England still played an important role in the United States.[48] For example, the Wills Act of 1837 provided uniformity to the

38. *See* 2 PAGE, *supra* note 8, § 19.13, at 61 (no formalities required; oral testament sufficient); J. ROOD, *supra* note 8, § 216 ("But in the early English law no solemnity seems to have been required to make any will.").

39. 2 POLLOCK & MAITLAND, *supra* note 8, at 323.

40. *Id.* The account is found in a charter dating from early in the twelfth century and concerned the estate of Wulfgeat.

41. 32 Hen. 8, ch. 1 (1540).

42. *See* T. ATKINSON, *supra* note 8, § 3, at 18.

43. *See id.*; J. ROOD, *supra* note 8, § 217, at 170.

44. 29 Car. 2, ch. 3 (1676).

45. *See* T. ATKINSON, *supra* note 8, § 3, at 19 (for wills merely bequesting personal property, there was still no requirement of the testator's signature or attesting witnesses).

46. 29 Car. 2, ch. 3, § 5 (1676).

47. *See* T. ATKINSON, *supra* note 8, § 4, at 23 (historical account of history of succession in the United States). *See also* 9 E. BAILEY, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 161, 261-66 (1968) (historical background of Texas wills statutes).

48. *See* T. ATKINSON, *supra* note 8, § 3, at 21 (United States did not overlook success of England in simplifying and modernizing wills law).

rules regarding real property and personal property;[49] required the will to be signed at the end; and reduced the number of attesting witnesses to two.

III. IMPORTANCE OF THE WILL EXECUTION CEREMONY

A. Psychological Effect on Client

In ancient times, it was common for people to maintain the superstitious belief that they would not live long after executing a will, even if they were in good health.[50] This belief continues today, and many individuals procrastinate making a will since the execution of a will is an admission of their mortality. Most people do not enjoy thinking about death, especially their own.[51] "[P]ersonal death is a thought modern man will do almost anything to avoid."[52] Even professional estate planners may find it difficult to prepare their own estate plans. "It is perhaps true that facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life."[53]

Every attorney needs to appreciate that clients for whom he is drafting wills are thinking about many things besides the disposition of their property upon death or how to reduce taxes. They may also be concerned about the following consequences of death:[54]

(1) they no longer can have any life experiences;

(2) they may be uncertain as to what will happen to them if there is a life after death;

(3) they may be afraid of what will happen to their bodies after death;

(4) they realize they will no longer be able to care for their dependents;

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49. 7 Will. 4 & Vict. 1, ch. 26, § 3 (1837).

50. *See* 3 W. HOLDSWORTH, *supra* note 8, at 538-39. *See also* 2 PAGE, *supra* note 8, § 19.3, at 61.

51. *See* Shaffer, *The "Estate Planning" Counselor and Values Destroyed By Death*, 55 IOWA L. REV. 376, 377 (1969) ("death is an unpleasant fact to modern man").

52. *Id.*

53. Nelson & Starck, *supra* note 3, at 348.

54. Diggory & Rothman, *Values Destroyed by Death*, 63 J. ABNORMAL & SOC. PSYCHOLOGY 205 (1961) (identification and discussion of these seven consequences of death). *See* Shaffer, *supra* note 51 (insightful report of study on estate planning clients using Diggory & Rothman test); Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME LAW. 345 (1969) (report of study on estate planning clients and how they confront and deal with death). Both of these articles by Shaffer are highly recommended reading for all attorneys assisting estate planning clients. *Cf.* Leimberg & Plotnick, *What a Probate Attorney Must Know About the Psychological Aspects of Death and Dying*, PRAC. LAW., Oct. 1986, at 33 (psychological aspects of dealing with testator's survivors).

(5) they realize that their death will cause grief to their relatives and friends;

(6) they realize that all their plans and projects will come to an end; and

(7) they may be afraid that the process of dying might be painful.

A proper ceremony, coupled with sensitive and tactful counseling by the attorney during the entire estate planning process, may make it easier for clients to cope with the inevitability of death. Further, it may help clients become "more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop."[55] Unfortunately, attorneys have been accused of showing "little concern about the therapeutic counseling that goes on in an 'estate planning' client's experience."[56] Attorneys always need to remember that many clients only make one will during their entire life and that the psychological effects of confronting death are strong. Attorneys who conduct scores of will ceremonies each year must not lose sight of the client's emotions and the psychological benefits that may be obtained through client interviews and will ceremonies.

One commentator has somewhat humorously summarized the psychological benefits of the ceremony as follows:

> When a client comes in to do something about his estate planning problem, he wants a lot of things. He wants solace because he is thinking about the day when he will not be here. He wants approval of what he has done and what he proposes to do. And he wants something else he almost never gets—a ceremony. Now, life offers very few opportunities for high ceremony. Birth is not a very good time. It is too laborious. Marriage is handled in rather a spectacular style. Nobody has been able to do much with divorce on the ceremonial side. For death, there is a ceremony, but it is hard for a decedent to be there to enjoy it. He is the principal.
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> The estate planning process . . . ought to be a high ceremonial occasion because a client should be getting great intangible satisfactions about these significant decisions that he has made that were embodied in the instruments he leaves behind.[57]

55. Shaffer, *supra* note 51, at 377.

56. *Id.* at 376.

57. *Estate Planning for Human Beings*, 3 U. MIAMI INST. ON EST. PLAN. § 69.1902 (P. Heckerling ed. 1969) (statement of Dean Willard H. Pedrick, panelist). *See also* J. PRICE, *supra* note 2, § 4.30, at 211 (will ceremony needs to satisfy client's expectations). *Contra* Field, *Execution of Wills in Michigan*, 16 MICH. ST. B.J. 527, 531 (1937) ("adherence to ritualistic formality in the execution of wills contributes little, if anything, to the social purposes of law").

B. *Effectuate Client's Intent*

The client's testamentary desires will be effectuated only if all formalities are satisfied.[58] The reporters are filled with cases in which a testator had the requisite legal and testamentary capacity and intent, but where a defect in the ceremony caused the will to fail.[59] A properly conducted will execution ceremony helps assure compliance with the various formalities required for a valid will as well as impressing the event on the witnesses' minds.

Under current Texas law, the formalities necessary for a valid non-holographic[60] will are that it be:[61]

> (1) written;
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> (2) signed by the testator or by another person for the testator by his direction and in his presence;
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> (3) attested by two or more credible witnesses who are at least fourteen years old;
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> (4) subscribed by the witnesses with their names in their own handwriting; and
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> (5) subscribed by the witnesses in the presence of the testator.

The stages of the ceremony crucial to satisfying these formalities are incorporated in the format set forth in section IV, below.

C. *Limit Exposure to Malpractice Liability*

The potential malpractice liability of an attorney for negligence in estate planning is great since estate planning requires an especially high

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58. *See* J. RITCHIE, N. ALFORD, JR. & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 192 (6th ed. 1982) [hereinafter RITCHIE] (will is void, not voidable, unless all formalities followed).

59. *See, e.g.*, Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966) (signatures of witnesses on self-proving affidavit rather than on will caused will to fail); Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (will invalid where witnesses attested to will in office while testator remained in conference room since witnesses required to attest in testator's presence); Cooper v. Liverman, 406 S.W.2d 927, 933 (Tex. Civ. App.—Texarkana 1966, no writ) (non-holographic codicil invalid for lack of witnesses' signatures). *But cf.* Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489 (1975) ("insistent formalism of the law of wills is mistaken and needless"); Nelson & Starck, *supra* note 3, at 356 (recommendation that courts be granted power to admit will to probate even if literal compliance with formalities is lacking, provided testamentary intent is clear).

60. No ceremony is needed for a holographic will. Holographic wills only need to be written wholly in the handwriting of the testator and signed. TEX. PROB. CODE ANN. § 60 (Vernon 1980).

61. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

degree of competence.[62] A thorough knowledge is required of many areas of the law: wills, probate, trusts, taxation, insurance, property, domestic relations, as well as others. As one commentator has stated, "Any lawyer who is not aware of the pitfalls in probate practice has been leading a Rip Van Winkle existence for the last twenty years."[63]

When errors with the will execution ceremony are discovered during the testator's lifetime, the testator's only loss is the cost of having another will prepared and executed. This is normally not the type of situation where malpractice liability will be litigated. The attorney may be able to avoid becoming a defendant by simply having the will re-executed without cost to the client and providing appropriate apologies for the inconvenience.

The problem is that errors in the ceremony often do not manifest themselves until after the client's death. At that time, the testator's estate probably could sue the negligent attorney. In a suit by the testator's estate, however, the only damages would be the attorney's fees paid for drafting the will since there would be no other diminution of the estate funds caused by the error. Accordingly, if there is a flaw in the will execution ceremony causing the will to be ineffective and that flaw can be traced to the conduct of the attorney in charge of the ceremony, it is the intended beneficiaries who now find themselves short-changed that are apt to bring a malpractice action.

Until recently, attorneys did not have to fear actions by these injured beneficiaries because the defense of lack of privity could be successfully raised. The general rule was that the attorney did not owe a duty to the intended beneficiary because there was no privity between the attorney and the beneficiary.[64] Although strict privity appears to be the majority view in most situations, courts are beginning to take a more liberal attitude toward actions brought by intended beneficiaries.

In 1958, the Supreme Court of California overruled the strict privity requirement in *Biakanja v. Irving*,[65] a case involving a notary public.

62. *See* Becker, *supra* note 5, at 759 ("comparatively few lawyers recognize the expertise and particular talents essential to estate planning").

63. Dahl, *An Ounce of Prevention—Knowing the Impact of Legal Malpractice in the Preparation and Probate of Wills*, 16 DOCKET CALL 9 (Summer 1981).

64. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 622 (2d ed. 1981); D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 12:2 (1980). *See generally* D. HORAN & G. SPELLMIRE, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 1-1 to 1-4 (1986) [hereinafter HORAN & SPELLMIRE] (discussion of common law privity and attorney-client relationships); Adams & Abendroth, *Malpractice Climate Heats Up for Estate Planners*, 126 TR. & EST. 41 (April 1987) (trend is to remove bars to intended beneficiaries' causes of action).

65. 320 P.2d 16 (Cal. 1958).

The plaintiff received only a one-eighth intestate share of the decedent's estate rather than the entire estate because the attestation of the will was improper.[66] The court rejected the body of common law requiring privity and determined that the imposition of a duty to third persons is a matter of policy and involves the balancing of six factors:[67]

(1) the extent to which the transaction was intended to affect the plaintiff;

(2) the foreseeability of harm to the plaintiff;

(3) the degree of certainty that the plaintiff suffered injury;

(4) the closeness of the connection between the defendant's conduct and the injury suffered;

(5) the moral blame attached to the defendant's conduct; and

(6) the policy of preventing future harm.

The court concluded that the defendant must have been aware from the terms of the will itself that the plaintiff would suffer the very loss which occurred if faulty solemnization caused the will to be invalid.[68] The court stated that such conduct needed to be discouraged rather than protected by immunity from civil liability as would have been the case if this plaintiff, the only person who suffered a loss, were denied a valid cause of action.[69] Accordingly, the notary was held liable for the difference between the amount which the intended beneficiary would have received had the will been valid and the intestate share.[70]

Less than four years later, the California Supreme Court repeated essentially the same principle in *Lucas v. Hamm*.[71] The court held that an attorney's liability for preparing a will could extend to the intended beneficiary. The court reasoned that:

> One of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of

66. *Id.* at 17.
67. *Id.* at 19.
68. *Id.*
69. *Id.*
70. *Id.* at 17, 19.
71. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

preventing future harm would be impaired.[72]

Several jurisdictions have followed these California cases and have held attorneys liable to the intended beneficiary.[73]

Until recently, no Texas court had confronted this issue although the courts were consistent in requiring privity between the plaintiff and the attorney in other contexts.[74] The Fourth Court of Appeals, in the case of *Berry v. Dodson, Nunley & Taylor, P.C.*,[75] became the first Texas court to address the issue. The decedent had a will which named his wife and his children by a former marriage as sole beneficiaries.[76] While hospitalized with terminal cancer, the decedent hired the defendant attorney to prepare a new will which would add his wife's children as beneficiaries, change the trustees of the trusts to be set up for the benefit of the children, and leave his wife certain business interests.[77]

Decedent died about two months after the attorney's initial consultation in the hospital.[78] The attorney had prepared a draft of a new will, but it was never executed.[79] The old will was probated, making the decedent's wife and children angry, and thus they brought a malpractice action against the attorney.[80]

After examining the facts and concluding that no privity existed between the attorney and decedent's wife and her children, the court held

72. *Id.* at 688. The court eventually held that the attorney was not negligent for failing to master a rule against perpetuities problem. *Id.* at 690.

73. *See, e.g.*, Stowe v. Smith, 441 A.2d 81, 83-84 (Conn. 1981) (intended beneficiary has cause of action against attorney under theory of contract for benefit of third party where attorney did not follow testator's instructions in preparing will); Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. 1983) (where attorneys failed to include paragraph in will naming plaintiff as sole residuary beneficiary, plaintiff can sue attorneys despite lack of privity); Auric v. Continental Casualty Co., 331 N.W.2d 325, 329 (Wis. 1983) (where attorney's negligence in failing to secure required number of signatures for will resulted in loss of bequest to testator's brother, attorney was liable to the brother for the amount of the bequest). *See generally* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 622 (2d ed. 1981); D. MEISELMAN, *supra* note 64, § 12:3, at 219-22; HORAN & SPELLMIRE, *supra* note 64, 2-4 to 2-5; Dahl, *supra* note 63.

74. *See, e.g.*, Graham v. Turcotte, 628 S.W.2d 182 (Tex. App.—Corpus Christi 1982, no writ) (mortgagors of real property sued bank's attorney for charging excessive attorney's fees in connection with collection of real estate lien note); Bell v. Manning, 613 S.W.2d 335 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (non-clients sued attorney alleging attorney's secretary made negligent representation in connection with construction contract); Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App.—Fort Worth 1968, no writ) (action for contingent fees by third party). *See generally* Comment, *Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint*, 14 ST. MARY'S L.J. 405 (1983).

75. 717 S.W.2d 716 (Tex. App.—San Antonio 1986),*writ dism'd by agr.*, 729 S.W.2d 690 (Tex. 1987).

76. *Id.* at 717.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

that this lack of privity precluded a negligence action by the intended beneficiaries.[81] The court recognized the growing trend in other jurisdictions to permit an intended beneficiary to recover in the absence of privity, but it refused to break with the general Texas privity requirement.[82]

The Texas Supreme Court granted the intended beneficiaries a writ of error;[83] however, before it could be heard, the case was dismissed by agreement of the parties.[84] The writ history of *Berry* indicates that attorneys who negligently conduct defective will execution ceremonies may not be able to escape liability in the future based on lack of privity.[85]

In addition to malpractice liability, the attorney could face discipline for professional misconduct for conducting improper ceremonies.[86]

IV. FORMAT FOR THE WILL EXECUTION CEREMONY

A. Preparing for the Ceremony

1. Proofread Will

Action: Before the client arrives for the will execution ceremony, the will should be carefully proofread for errors such as misspellings, omissions, erasures, overstrikes, or interlineations.[87] To increase the likelihood of detecting errors, it may be advisable for another member of the firm to review the will. All errors which are uncovered should be carefully corrected.

Purpose: Misspelled names of beneficiaries, executors, guardians, or trustees, incorrectly typed figures, and like errors may lead to dispositions of property or appointment of fiduciaries different from those intended by the testator. Unless such errors are brushed aside by the

81. *Id.* at 718.

82. *Id.* at 718-19.

83. Berry v. Dodson, Nunley & Taylor, P.C., 30 Tex. Sup. Ct. J. 128 (Jan. 10, 1987) (grant of writ on point of error no. 1).

84. Berry v. Dodson, Nunley & Taylor, P.C., 729 S.W.2d 690 (Tex. 1987).

85. *See* Dickey v. Jansen, 731 S.W.2d 581 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (although majority followed *Berry* and did not allow intended beneficiaries to recover, dissenting opinion by Chief Justice Evans agreed with argument that intended beneficiaries had stated a cause of action); *see also* Baron, *The Expansion of Legal Malpractice Liability in Texas*, 29 S. TEX. L. REV. 355, 361 (1987).

86. An attorney must provide competent services for clients and must use appropriate legal knowledge, skill, and preparation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1980). *Cf.* People v. Berge, 620 P.2d 23 (Colo. 1980) (although testator's assets distributed according to his intent, attorney's improper conduct in estate planning process led to 90-day suspension from practice of law); Florida Bar v. Schonbrun, 257 So.2d 6 (Fla. 1971) (having various pages of will typed with different ribbons and allowing testator's signature to be made with two pens were some of factors court considered in giving attorney a public reprimand).

87. RITCHIE, *supra* note 58, at 207.

court[88] or give rise to an ambiguity so that extrinsic evidence is admissible to remedy the error,[89] the ability to correct the mistakes will die along with the testator.[90]

2. *Assure Internal Integration of Will*

Action: The will should be inspected to make certain it is internally integrated. For example, all pages should be typed or printed on the same kind of paper; all pages should be the same size; the type style should be consistent throughout the will;[91] the entire will should be typed with the same ribbon; each page should be numbered;[92] and blank spaces should be avoided. In addition, all pages should be securely fastened together.[93] This may be done before the day of the ceremony, but it is better practice to wait until the client has read and approved the final draft of the will so that last-minute corrections and changes may be readily made.

Purpose: These precautions help reduce the chance of fraudulent page insertion and also make it easier to show that the pages present at the time of the ceremony are the same pages offered for probate.[94]

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88. *See* Najvar v. Vasek, 564 S.W.2d 202, 205-06 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (will provision leaving property to "Elvin" was meant to be "Alvin").

89. *See, e.g., In re* Estate of Cohorn, 622 S.W.2d 486 (Tex. App.—Eastland 1981, writ ref'd n.r.e.) (extrinsic evidence used to resolve ambiguity where will provision devising "Tract 81, League 277" shown to refer to "Tract 81, League 278"); Hultquist v. Ring, 301 S.W.2d 303, 305 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.) (extrinsic evidence used to resolve ambiguity where will provision leaving property to "Alma" was shown to be meant for "Elmer").

90. *See, e.g.*, Huffman v. Huffman, 339 S.W.2d 885 (Tex. 1960) (court refused to insert words, numbers, or punctuation to alter language of will); Carpenter v. Tinney, 420 S.W.2d 241, 244 (Tex. Civ. App.—Austin 1967, no writ) (stating general rule that "courts have no right to vary or modify the terms of a will or to reform it even on grounds of mistake"); Morton v. Calvin, 164 S.W. 420 (Tex. Civ. App.—Texarkana 1914, writ ref'd) (language of will controls; cannot remedy mistakes even if clear and convincing evidence of testator's contrary intent).

91. *See* Johanson, *supra* note 3, at 10-11.

92. *See, e.g.*, J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 205 (3d ed. 1984) [hereinafter DUKEMINIER & JOHANSON]; S. KURTZ, FAMILY ESTATE PLANNING 55 (1983); Comment, *Technical Aspects of a Will: A Guide to Valid Execution and Revocation in Illinois and the Sunbelt States*, 7 J. MARSHALL J. PRAC. & PROC. 126, 135 (1971) (numbering pages as "page 3 of 5," for example).

93. *See* DUKEMINIER & JOHANSON, *supra* note 92, at 205; RITCHIE, *supra* note 58, at 207; *see also* P. CALLAHAN, HOW TO MAKE A WILL—HOW TO USE TRUSTS 23-24 (I. Sloan ed. 4th ed. 1978). If stapling is used, the staples should not be removed since multiple staple holes may be evidence of improper page substitution. *See* Mahan v. Dovers, 730 S.W.2d 467, 469 (Tex. App.—Fort Worth 1987, no writ).

94. *See* Comment, *supra* note 92, at 135; *see also* P. CALLAHAN, *supra* note 93, at 23-24.

3. Review Will with Client

Action: The client should carefully read the will to make certain all provisions are in accord with the client's desires and that changes (if any) from prior drafts have been made.[95] The attorney should make certain the client understands the will and that it correctly states his testamentary desires.[96]

Purpose: The final review of the will by the client helps assure the attorney that the will accurately reflects the testator's desires. Testimony from the attorney that this final review took place may provide evidence of testamentary intent. "An instrument is not a will unless it is executed with testamentary intent . . . . It is essential, however, that the [testator] shall have intended to express his testamentary wishes in the particular instrument offered for probate."[97]

4. Explain Ceremony to Testator

Action: The attorney should explain the mechanics of the will execution ceremony to the testator in language the testator understands.[98] Avoid using legal jargon since the testator may be too embarrassed to admit he does not understand. The testator should be familiar with the procedure detailed in section B, below, and know what to expect, such as the questions that will be asked and the things he will be expected to do. In addition, the attorney should stress "the need for meticulous attention to form and detail."[99]

Purpose: Since a will execution ceremony is often a difficult emotional experience for the client, the client may be put at ease by a thoughtful explanation of what is to take place.[100] It may be helpful to think of the state of mind you were in when you executed your will; the attorney should not hide behind a cloak of professional detachment.[101]

B. The Will Execution Ceremony

The format for the will execution ceremony discussed in this section contains several parts which are not strictly necessary for the validity of a will under Texas law.[102] Conducting a bare-minimum ceremony, how-

95. 1 A. CASNER, ESTATE PLANNING 134 (4th ed. 1980).
96. *Id.*; S. KURTZ, *supra* note 92, at 55 (1983).
97. Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955).
98. *See* SOUTHERN METHODIST UNIVERSITY, THIRD ANNUAL SYMPOSIUM ON ESTATE PLANNING I-33 (1980) [hereinafter THIRD ANNUAL SYMPOSIUM].
99. *Id.*
100. *Id. See supra* § III(A).
101. THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-33.
102. TEX. PROB. CODE ANN. § 59 (Vernon 1980). *See supra* § III(B).

ever, is not advisable. Not only would any failure to comply with the procedure for such a ceremony cause the will to fail, but the opportunity to practice preventive estate planning would be lessened. By taking the small amount of extra time and effort to conduct a solid ceremony, it may often be possible to reduce the chance of a successful will contest.

Another important reason to follow the entire procedure is that the law of some other jurisdiction may apply to the will. The will may be offered for probate in another state that has additional or different requirements, either because the testator dies domiciled in another state or owns real property located outside of Texas.[103] Although some jurisdictions have statutes recognizing wills which comply with the law of the state in which the will was executed, others do not.[104] Thus it is dangerous to attempt to trigger this type of statute to save the will at the time of the testator's death.[105] "A lawyer should draft wills so that there is no need to resort to such an act. Hence the careful lawyer in our highly mobile society draws a will and has it executed in a manner that satisfies the formal requirements in all states."[106] It may be necessary to consult the law of a foreign nation if the client is not a United States domiciliary or owns property in another country.[107]

Although the will execution procedure set forth below complies with and stresses Texas law, the procedure should satisfy the requirements of most of the other states.[108] Therefore, portions of the suggested

103. 1 A. CASNER, *supra* note 95, at 132-33; DUKEMINIER & JOHANSON, *supra* note 92, at 204 (power of appointment governed by the law of another jurisdiction may also be exercised by will).

104. *See* UNIF. PROB. CODE § 2-506, 8 U.L.A. 116 (1983) (adopting states include Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah); *see also* 8 U.L.A. 1 (1983 & Supp. 1987) (table of jurisdictions where adopted). Other states have provisions similar to § 2-506.

Texas does not have such a savings statute. However, Texas law permits ancillary probate for foreign wills already probated elsewhere, TEX. PROB. CODE ANN. § 95 (Vernon 1980), and original probate of foreign wills which comply with Texas law. TEX. PROB. CODE ANN. § 103 (Vernon 1980).

105. *See* DUKEMINIER & JOHANSON, *supra* note 92, at 204-05 ("These statutes, where enacted, are not all uniform, however, and sometimes contain exceptions."); J. PRICE, *supra* note 2, § 4.28, at 210 (avoid reliance on choice of law rules).

106. DUKEMINIER & JOHANSON, *supra* note 92, at 205. *See* J. PRICE, *supra* note 2, § 4.30, at 211 (ceremony should satisfy law of most demanding state).

107. *See, e.g.*, R. HENDRICKSON, INTERSTATE AND INTERNATIONAL ESTATE PLANNING (1968); J. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING (1982 & Supp. 1987); Beyer, *Drafting Wills for Foreign-Domiciled Clients*, PRAC. LAW., Dec. 1986, at 61.

108. For examples of will execution ceremonies which attempt to comply with the laws of most of the states, see 1 A. CASNER, *supra* note 95, at 134-37; DUKEMINIER & JOHANSON, *supra* note 92, at 205-07 (except Louisiana by a Louisiana domiciliary); S. KURTZ, *supra* note 92, at 55-56 (except Louisiana); T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND

ceremony which are not required in Texas may be necessary under the law of another state. If the law of some other jurisdiction is likely to apply, it is highly recommended that the law of that state or country be carefully studied and that an authority in that jurisdiction be consulted to make certain the client's desires are not jeopardized by a defective ceremony.

1. Location

Action: The will execution ceremony should take place in a pleasant surrounding. A conference room works well, as does a large office with a conference table and chairs.

Purpose: The testator should be comfortable and at ease with the ceremony. A client will be more satisfied and will present a better image to the witnesses, which may be important if their testimony is needed later. A fairly large table around which all participants may sit makes it easier for the attorney to supervise the ceremony and for everyone to observe what is taking place.

2. Interruptions

Action: The ceremony should be free of interruptions.[109] Thus, all telephone calls should be held, and secretaries and others should be notified that the ceremony is not to be disturbed. Once the ceremony begins, no one should enter or leave the room until the ceremony is over.[110]

Purpose: Interruptions detract from the solemnity of the occasion. Additionally, interruptions disrupt the flow of the ceremony and may result in the attorney inadvertently omitting a key part of the ceremony.

3. Gathering of Participants

Action: The testator, at least two (preferably three) disinterested witnesses, a notary, and the attorney should be gathered in the appropriate location. Under normal circumstances, no one else should be present.[111]

Purpose: The testator must be present since he must sign the will

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TRUSTS 70-73 (2d ed. 1979) (safeguards to make will effective in all states); Comment, *supra* note 92, at 133-35 (effective in most states). *See generally* L. CUSACK & T. SNEE, DOCUMENTS AND DATA FOR ESTATE PLANNING 319-23 (1963) (will execution checklist and sample will execution file memorandum); C. GALVIN, ESTATE PLANNING MANUAL § 4.4 (1987) (general description of ceremony).

109. RITCHIE, *supra* note 58, at 208.

110. DUKEMINIER & JOHANSON, *supra* note 92, at 206; S. KURTZ, *supra* note 92, at 56.

111. *See* 1 A. CASNER, *supra* note 95, at 134-35; DUKEMINIER & JOHANSON, *supra* note 92, at 205-06.

and the witnesses must subscribe in his presence.[112]

Texas law, like the law in the vast majority of states, requires only two witnesses.[113] There are, however, a few states which require three witnesses or have other special witnessing requirements.[114] All of the witnesses should be disinterested (not beneficiaries under the will) so that they have no motive to lie about the ceremony or to exert improper influence over the testator.[115] If a witness is also a beneficiary under the will, the general rule in Texas is that the gift to that witness is void.[116] If the witness would have been entitled to a share of the testator's estate had the testator died intestate, however the interested beneficiary may take the smaller of the intestate share and the gift in the will.[117] Additionally, the gift will stand if the interested beneficiary's testimony can be corroborated by the testimony of a disinterested and credible person.[118]

The notary is necessary for the completion of the self-proving affidavit.[119] In a few jurisdictions, a notary is required for the will's validity.[120]

The attorney in charge of the ceremony needs to be present to supervise the execution of the will. It is the attorney's responsibility to make certain everything is done correctly. A legal assistant, paralegal, or law clerk should not be allowed to supervise the execution of a will.[121] Not only may such a person make errors, but the delegation itself may be considered the aiding of a non-lawyer in the unauthorized practice of law in violation of professional conduct rules.[122]

There is normally no need for anyone else to be present. This is

112. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

113. *Id.*

114. *See, e.g.*, LA. CIV. CODE ANN. arts. 1581, 1582 (West 1987) (private will needs five witnesses, two of whom must be able to sign their names, and others may sign by a mark; public will requires three witnesses); 20 PA. CONS. STAT. ANN. § 2502 (Purdon 1975) (witnesses only required where testator unable to sign his name or signs by mark); VT. STAT. ANN. tit. 14, § 5 (1974) (three witnesses required).

115. *See generally* Gulliver & Tilson, *supra* note 9, at 11-13 (discussion of purposes of disinterested witnesses requirement).

116. TEX. PROB. CODE ANN. § 61 (Vernon 1980). The rest of the will is still effective.

117. *Id.* The witness then has no motive to lie about the ceremony since he will receive that amount regardless of the will's validity.

118. *Id.* § 62.

119. *Id.* § 59 (will may be made self-proved by affidavit of testator and witnesses before a notary).

120. LA. REV. STAT. ANN. § 9:2442 (West Supp. 1986) (public will); N.H. REV. STAT. ANN. § 551:2-A (Supp. 1986).

121. *See* J. PRICE, *supra* note 2, § 1.9, at 26. *Contra* Johanson, *supra* note 3, at 12 (paralegal can supervise execution ceremony as long as properly trained).

122. Attorney may delegate tasks only if he supervises the work and remains responsible for it. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1980); *id.* EC 3-6; MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983). Supervising the execution of wills constitutes "practicing law." Palmer v. Unauthorized Practice Comm. of the State Bar,

especially true for relatives and beneficiaries under the will since their absence may reduce claims of overreaching and undue influence.[123]

4. Seating of Participants

Action: The participants should be seated around a table so each can easily observe and hear the others.[124] It is also beneficial for the attorney to be seated so that he has easy access to the testator and witnesses.

Purpose: It is often required as part of the will execution ceremony that participants observe, or be in a position to observe, each other doing certain things. For example, in Texas the witnesses must subscribe in the presence[125] of the testator.[126] The attorney should be conveniently located near the participants to indicate the proper locations for initialing and signing.[127]

5. General Introductions

Action: The attorney should thank the witnesses and the notary for attending the ceremony and introduce all participants, if not already known.

Purpose: Although it would be better practice to have witnesses who are acquainted with the testator,[128] such is frequently not the case; the witnesses and testator often meet for the first and last time at the ceremony. "It is a fairly common practice to recruit secretaries, other lawyers, or a man off the street to witness a Will."[129] This makes the introductions especially important since the witnesses should at least be able to remember the identity of the person whose will they are witnessing.

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438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). *See generally* J. PRICE, *supra* note 2, § 1.9, at 26.

123. *See* Rothermel v. Duncan, 369 S.W.2d 917 (Tex. 1963) (beneficiary connected with making will is evidence of undue influence). *See also* Gulliver & Tilson, *supra* note 9, at 9 (wills statutes serve purpose "of protecting the testator against imposition at the time of execution" but such objective "difficult to justify under modern conditions").

124. *See* S. KURTZ, *supra* note 92, at 56; Comment, *supra* note 92, at 133.

125. *See infra* note 164 and accompanying text.

126. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

127. *See* RITCHIE, *supra* note 58, at 208 (attorney should indicate place for testator's signature).

128. If a will contest occurs, especially on grounds of lack of testamentary capacity, the testimony of the attesting witnesses may be needed. That testimony will have greater weight if the witnesses were previously acquainted with the testator. *See* THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-33; 17 M. WOODWARD & E. SMITH, III, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 336, at 278 (1971) [hereinafter WOODWARD & SMITH].

129. THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-32.

6. General Explanation

Action: The attorney should explain that the will execution ceremony is about to commence and that the will controls where the testator's property goes upon his death. Everyone should be told to pay close attention to the proceedings.[130]

Purpose: Although publication is not required under Texas law for a valid will,[131] it is useful for the witnesses to know what is being witnessed since it may help them to remember the ceremony. Additionally, publication is required for the self-proving affidavit.[132]

7. Special Steps if Will Contest Anticipated

Action and Purpose: The attorney may have grounds for believing that a will contest is likely upon the testator's death. It may be that the testator is leaving a significant amount of property to distant relatives, friends, or charity while close relatives, such as a spouse or a child, are being omitted. The testator's mental capacity may be in doubt due to age, illness, or accident. In these types of situations, special steps need to be taken during the ceremony to demonstrate the testator's capacity to the witnesses since their testimony is more likely to be needed. Witnesses will be competent to give opinion evidence as to the testator's capacity only if they have had sufficient opportunity to observe the testator.[133]

To provide this opportunity, the testator should discuss such things as his family situation, the nature and extent of his property, his relationship to the witnesses and his profession so that the witnesses will have more evidence of testamentary capacity to recall should the need arise.[134]

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130. *See* Comment, *supra* note 92, at 133.

131. *See* Davis v. Davis, 45 S.W.2d 240 (Tex. Civ. App.—Beaumont 1931, no writ) (witnesses need not know contents of will nor that instrument is testator's will).

132. TEX. PROB. CODE ANN. § 59 (Vernon 1980) (affidavit states in part "testator . . . declared to . . . said witnesses . . . that said instrument is his last will and testament").

133. *See* Whatley v. McKanna, 207 S.W.2d 645 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.) (subscribing witness not competent to give opinion on soundness of testator's mind because of lack of previous contacts and only scant recollection of will ceremony). *See* THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-32; 17 WOODWARD & SMITH, *supra* note 128, § 336.

134. This discussion should reflect the jury instruction defining testamentary capacity found in Prather v. McClelland, 76 Tex. 574, 584-85, 13 S.W. 543, 546 (1890):

> testator . . . must have been capable of understanding the nature of the business he was engaged in, the nature and extent of his property, the persons to whom he meant to devise and bequeath it, the persons dependent upon his bounty, and the mode of distribution among them; that he must have had memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relations to each other, and be able to form a reasonable judgment as to them.

See also 1 A. CASNER, *supra* note 95, at 140 (witnesses should "promptly record in a written document their version of the discussion and the views formulated by them at the time as to

In these situations, it may be advisable to use witnesses previously acquainted with the testator.[135] Other techniques, such as videotaping the will execution ceremony[136] or preparing a notarized transcript of the ceremony,[137] may also be appropriate.[138]

8. Questions to Testator

Action: After being handed the will, the testator should be asked the following questions and he should answer each question as indicated in brackets so that all witnesses can hear.[139]

(a) "[Name of testator], is this your will?" ["Yes."]

(b) "Have you carefully read your will and do you understand it?" ["Yes."]

(c) "Do you wish to make any additions, deletions, corrections, or other changes to your will?" ["No."]

(d) "Does this will dispose of your property at your death in accordance with your wishes?" ["Yes."]

(e) "Do you request [names of witnesses] to witness the execution of your will?" ["Yes."]

Purpose: These questions demonstrate that the testator had testamentary intent—the intent to have this very document serve as his will.[140]

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the mental competency of the testator and as to freedom from undue influence"); THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-31 to I-33.

135. "The jury is likely to give little weight to the testimony of a witness who never saw the testator before or after the execution of the will, and whose opportunity to form a conclusion was limited to the single brief occasion." 17 WOODWARD & SMITH, *supra* note 128, § 336, at 278. *See also* THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-33.

136. *See, e.g.*, Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983); Beyer, *Video Requiem: Thy Will Be Done*, 124 TR. & EST. 24 (July 1985); Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 21 OHIO N.U.L. REV. 271 (1984); Nash, *A Videowill: Safe and Sure*, 70 A.B.A. J. 87 (Oct. 1984).

137. THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-34 (transcript should also include facts concerning testator's physical and emotional condition).

138. *See generally* Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87 (1958) (prepare for anticipated will contest at time of will preparation).

139. *See* P. CALLAHAN, *supra* note 93, at 24; DUKEMINIER & JOHANSON, *supra* note 92, at 206; *see also* S. KURTZ, *supra* note 92, at 56 (suggests that request of witnesses' question be asked after testator signs); Comment, *supra* note 92, at 134; *see also* 1 A. CASNER, *supra* note 95, at 134-37 (longer, complex questions rather than individual questions).

140. *See* Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955) ("An instrument is not a will unless it is executed with testamentary intent . . . [and the testator] shall have intended to express his testamentary wishes in the particular instrument offered for probate.").

9. Execution by Testator

The execution of the will by the testator should contain the following:

a) Action: Testator initials each page of the will, except the last page, at the bottom or in the margin.[141] The initials should appear at the same place on each page.

Purpose: The initialing of each page by the testator shows that the pages present during the will execution ceremony are the same ones that are being offered for probate. This will help reduce later claims of page substitution.[142]

The testator should execute only one will. "Multiple copies should not be executed because of the difficulty of accounting for all of them and the presumption of revocation that may arise if all of the executed copies cannot be produced."[143]

b) Action: The testator dates the will and indicates the place of its execution in the testimonium clause.[144]

Purpose: "Certain forms of disability can make a person become disoriented in time. He may not know what day it is, or where he is. The testator's ability to orient himself in time and space may be additional evidence of his [testamentary] capacity."[145]

c) Action: The testator signs the will at the end.[146] If the testator is unable to sign, he may direct another person to sign for him in his presence.[147]

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141. *See* P. CALLAHAN, *supra* note 93, at 25; DUKEMINIER & JOHANSON, *supra* note 92, at 206 (testator may sign each page, rather than initial); J. PRICE, *supra* note 2, § 4.30, at 211.

142. *See* DUKEMINIER & JOHANSON, *supra* note 92, at 206; S. KURTZ, *supra* note 92, at 56.

143. J. PRICE, *supra* note 2, § 4.30, at 212. *See* Combs v. Howard, 131 S.W.2d 206 (Tex. Civ. App.—Fort Worth 1939, no writ) (revocation of one of two original wills could either indicate testator's intent to revoke both wills or intent to strengthen validity of remaining will).

144. *See* J. PRICE, *supra* note 2, § 4.30, at 211; THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-34 (testator should also note the time).

145. THIRD ANNUAL SYMPOSIUM, *supra* note 98, at I-34.

146. *See, e.g.*, DUKEMINIER & JOHANSON, *supra* note 92, at 206; J. PRICE, *supra* note 2, § 4.30, at 211; S. KURTZ, *supra* note 92, at 56 (suggests that testator again declare that instrument is his will); Comment, *supra* note 92, at 135. The testator should use the same pen for his entire signature. *See* Florida Bar v. Schonbrun, 257 So. 2d 6, 8 (Fla. 1971) (court critical of attorney who permitted testator to sign with more than one pen; this, coupled with other facts, led to attorney being publicly reprimanded).

147. TEX. PROB. CODE ANN. § 59 (Vernon 1980). This provision does not limit proxy signatures to situations where the testator is educationally or physically unable to sign. Nonetheless, proxy signatures should only be used as a last resort since they are prone to raise will contest issues such as lack of testamentary capacity. If a proxy signature is used,

> good practice suggests that the agent who does the writing of the testator's signature should also sign his own name, identifying himself as the scribe, that this should be

Purpose: The testator's signature is essential to the validity of the will.[148] Although a testator may sign anywhere in the will under Texas law, it is advisable for the testator to sign at the end.[149] This helps reduce claims that material was added after the testator executed the will, either by the testator or other parties.[150]

d) Action: The attorney watches closely to make certain everything is written in the proper locations.

Purpose: Since the will fails without the testator's proper signature, the attorney must make certain that the testator actually signs the will and not merely some other document such as the self-proving affidavit.[151]

e) Action: The witnesses watch the testator signing the will.[152]

Purpose: It is not necessary for the witnesses to see the testator sign the will under Texas law.[153] Nonetheless, it is good practice to have the witnesses see the signing so that they can testify to the signing if necessary.[154]

10. Attestation by Witnesses

The attestation of the will by the witnesses should contain the following:

a) Action: One of the witnesses reads the attestation

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done in the presence of the attesting witnesses, and that the attestation clause should recite the fact that the testator was unable to write and directed the agent to write his signature and that this was done in the presence of the testator and in the presence of the attesting witnesses.

9 E. BAILEY, *supra* note 47, § 272, at 417.

148. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980). In addition, the signature "has evidentiary value in identifying, in most cases, the maker of the document." Gulliver & Tilson, *supra* note 9, at 7.

149. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980) (no indication of location of signature); *see generally* 9 E. BAILEY, *supra* note 47, § 273; 2 PAGE, *supra* note 8, §§ 19.54-.72 (some jurisdictions require testator's signature to be at end of will).

150. Gulliver & Tilson, *supra* note 9, at 7. Likewise, "since it is the ordinary human practice to sign documents at the end, a will not so signed does not give the impression of being finally executed." *Id.* at 5-6.

151. *See* Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985) (will invalid where testator did not sign will but merely signed the self-proving affidavit).

152. *See, e.g.*, 1 A. CASNER, *supra* note 95, at 136-37; DUKEMINIER & JOHANSON, *supra* note 92, at 206; J. PRICE, *supra* note 2, § 4.30, at 211; Comment, *supra* note 92, at 134.

153. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980) (no requirement that witnesses see testator sign).

154. In addition, some states require the witnesses to see the testator sign. *See, e.g.*, LA. REV. STAT. ANN. § 9:2442(1) (West Supp. 1986) (testator must sign in presence of notary and two witnesses); N.M. STAT. ANN. § 45-2-502(B) (1978) (witnesses must see testator sign the will).

clause aloud.[155]

Purpose: There is no legal requirement that the will contain an attestation clause, much less that it be read.[156] Reading the clause, however, does impress the will execution ceremony on the minds of the witnesses.

b) Action: Each witness initials each page, except the page containing the attestation clause, either at the bottom or in the margin. The witnesses should initial in the same place on each page.

Purpose: This step helps reduce later claims of page substitution, as does the testator's initialing of each page.

c) Action: One of the witnesses dates the attestation clause.

Purpose: The dating of the attestation clause provides additional evidence of the date the will was executed.

d) Action: Each witness signs the attestation clause and writes his address.[157]

Purpose: In Texas, for a formal will to be valid, it must be attested to by at least two credible witnesses above the age of fourteen and they must subscribe their names in their own handwriting.[158] Proxy signatures for the witnesses are not permitted.[159] In addition, the witnesses should sign at the end of the will, below the signature of the testator, although this may not be required.[160] Having the witnesses do so helps assure that the "sheet on which the signatures appear is an integral part of the will."[161] It is important to have the witnesses indicate their ad-

155. *See* 1 A CASNER, *supra* note 95, at 138; DUKEMINIER & JOHANSON, *supra* note 92, at 206; S. KURTZ, *supra* note 92, at 56; *See also* Comment, *supra* note 92, at 134 (the attorney, rather than a witness, may read the attestation clause aloud).

156. *See* DUKEMINIER & JOHANSON, *supra* note 92, at 206 n.22 ("No state's statute requires the use of an attestation clause."); Comment, *supra* note 92, at 134 ("attestation clause is not legally necessary").

157. *See* 1 A. CASNER, *supra* note 95, at 138-39; DUKEMINIER & JOHANSON, *supra* note 92, at 207 (recommends that first witness to sign write below witness signature blanks " 'the foregoing attestation clause has been read by us and is accurate;' " all witnesses should then initial this statement).

158. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980).

159. *See id.* (requirement that witnesses subscribe in own handwriting); 9 E. BAILEY, *supra* note 47, § 292.

160. Despite use in TEX. PROB. CODE ANN. § 59 (Vernon 1980) of the word "subscribed," case law has indicated that this word will not be strictly interpreted. *See* Fowler v. Stanger, 55 Tex. 393 (1881) (will valid although witnesses signed above testator's signature but below substantive provisions); *see generally* 9 E. BAILEY, *supra* note 47, § 294.

161. 9 E. BAILEY, *supra* note 47, § 294, at 470. Bailey also states that "the expertly drawn will always contains an attestation clause, and it would seem to be good practice to have the

dresses so that a starting point exists for locating them should their testimony be needed at the probate of the will.

e) Action: The attorney watches closely to make certain everything is written in the proper locations.

Purpose: The will fails if it does not contain the proper attestation.[162] Therefore, the attorney must make certain the witnesses actually sign the will and not, for example, only the self-proving affidavit.

f) Action: The testator observes the witnesses signing the will and the witnesses observe each other signing.[163]

Purpose: Although the testator is not required to actually see the witnesses sign the will, it is necessary for the attestation to take place in the testator's presence.[164] The term "presence" means a conscious presence: "the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance."[165] The purpose of this requirement is "to prevent the witnesses substituting some other paper for the will actually executed by the testator."[166]

The witnesses need not see each other sign nor sign in each other's presence.[167] Nonetheless, it is advisable that they see each other sign so that they can give better testimony concerning the ceremony if the need should arise.

11. Declaration That Will is Executed

Action: The attorney states that the will has been executed and attested and that the will is now complete.

Purpose: This step makes a clear demarcation between the actual will ceremony and the execution of the self-proving affidavit. It is vital that the will be properly executed and attested before completing the self-

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pages typed so that at least a part of the attestation clause will appear on the same sheet with, and immediately above, the signatures of the attesting witnesses." *Id.*

162. *See* Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983) (will invalid where witnesses did not sign will but only signed self-proving affidavit despite fact that end of will and self-proving affidavit were on same page); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966) (will invalid where witnesses did not sign will but merely signed self-proving affidavit).

163. *See* DUKEMINIER & JOHANSON, *supra* note 92, at 207.

164. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

165. Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.). *See also* Morris v. Estate of West, 643 S.W.2d 204 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (attestation not in presence of testator where testator could not have seen witnesses sign without walking four feet to office door and fourteen feet down hallway). *See generally* 9 E. BAILEY, *supra* note 47, §§ 289-90 (1968 & Supp. 1987).

166. Gulliver & Tilson, *supra* note 9, at 10.

167. TEX. PROB. CODE ANN. § 59 (Vernon 1980) (no mention of these formalities).

proving affidavit since the self-proving affidavit has no value if the will is invalid; a self-proving affidavit cannot be used to supply any missing portion of the will.[168]

12. Execution of Self-Proving Affidavit

Action:

(a) The attorney should explain the purpose and effect of a self-proving affidavit to the testator and witnesses, i.e., to make probate easier by allowing the will to be admitted without the testimony of any of the witnesses.[169]

(b) The notary should take the oath of the testator and witnesses.

(c) The notary should have the testator answer "yes" to the following questions:

(1) "[Name of testator], is this document your last will and testament?"

(2) "Have you willingly made and executed your will?"

(3) "Did you do so as your free act and deed for the purposes therein expressed?"

(d) The notary should have each witness answer "yes" to the following questions:

(1) "Did [name of testator] declare to you that this is his [her] last will and testament?"

(2) "Did [name of testator] execute this document as his [her] last will and testament?"

(3) "Did [name of testator] want [names of witnesses] to sign it as witnesses?"

(4) "Did you sign the will as a witness?"

(5) "Did you sign the will in [name of testator]'s presence?"

168. *See* Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985) (signature of testator on self-proving affidavit no remedy for lack of testator's signature on will); Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983) (signatures of witnesses on self-proving affidavit will not remedy lack of witnesses' signatures on will even though will ended on page containing self-proving affidavit); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966) (signatures of witnesses on self-proving affidavit will not remedy lack of witnesses' signatures on will); *see also* Note, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904 (1983) (criticizing intent-frustrating result caused by strictly construing § 59 of the Texas Probate Code).

169. TEX. PROB. CODE ANN. §§ 59, 84(a) (Vernon 1980). Section 59 states, "A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self-proved." Section 84(a) provides, "If a will is self-proved as provided in this Code, no further proof of its execution with the formalities and solemnities and under the circumstances required to make it a valid will shall be necessary."

(6) "Did you sign the will at the request of [name of testator]?"

(7) "Was [name of testator] at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service)?"

(8) "Was [name of testator] of sound mind?"

(9) "Are you at least fourteen years of age?"

(e) The testator and witnesses sign the affidavit.

(f) The notary signs the affidavit and affixes the appropriate seal or stamp.

(g) The notary then records the ceremony in the notary's record book.

Purpose: A properly executed self-proving affidavit makes the probate of the will much easier since the testimony of the subscribing witnesses are unnecessary.[170] These questions are designed to cover all of the elements of the form for a self-proving affidavit provided in the Texas Probate Code.[171] Although other forms may work,[172] there is no need to deviate from the statutory form other than to make appropriate gender changes.

Texas law requires the ceremony to be recorded in the notary's record book.[173] Unfortunately, this step and its importance are frequently

170. *Id.* § 59. Note that one commentator suggests that the affidavit be read aloud to the testator and the witnesses either by the notary or in the presence of the notary. DUKEMINIER & JOHANSON, *supra* note 92, at 207. Use of shorter, individual questions, however, tends to enhance the seriousness of the affidavit and better impresses the event on the witnesses' memories.

171. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

172. *Id.* (form and its contents has to be "substantially" as given).

173. Act of June 19, 1987, ch. 891, § 6, 1987 Tex. Sess. Law Serv. 5 (Vernon) states:

> Each notary public shall keep a well bound book, in which shall be entered the date of all instruments notarized by him, the date of such notarizations, the name and signature of the grantor or maker, the place of his residence or alleged residence, whether personally known, identified by an identification card issued by a governmental agency or a passport issued by the United States, or introduced, and, if introduced, the name and residence or alleged residence of the party introducing him; if the instrument be proved by a witness, the residence of such witness, whether such witness is personally known to him or introduced; if introduced, the name and residence of the party introducing him; . . . . The book herein required to be kept, and the statements herein required to be entered shall be an original public record, open to inspection by any citizen at all reasonable times. Each notary public shall give a certified copy of any record in his office to any person applying therefor on payment of all fees thereon.

This Act amended article 5955 which was repealed and recodified at Tex. Gov't Code Ann.

overlooked. Should the need arise, the notary's record book may provide important evidence of the ceremony, such as the date and time of ceremony, the fact that the testator and the witnesses were actually present, and addresses of all parties.[174]

13. Execution of Other Documents

Action: The attorney should supervise the execution and witnessing of other estate planning documents.

Purpose: An attorney often prepares other estate planning documents for the client in addition to the will. Since many of these documents require formalities similar to a will (witnesses and self-proving affidavits), it is convenient and efficient to execute them along with the will. Examples of these documents include:

a) document making an anatomical gift;[175]

b) directive to physicians to withhold or withdraw life-sustaining procedures if the declarant is in a terminal condition;[176] and

c) self-designation of a guardian before the need arises.[177]

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§ 406.014 (Vernon Pamph. 1988). The repeal of the statute does not affect the amendment which will be given effect as part of the Code. *See* Code Construction Act, TEX. GOV'T CODE ANN. § 311.031(c) (Vernon 1987). Under the old Penal Code, the penalty for failure of a notary to record each acknowledgment was a fine of "not less than one hundred nor more than five hundred dollars." TEX. PENAL CODE ANN. art. 362 (Vernon 1925) (repealed 1973). This provision was replaced by § 37.10 which makes the intentional impairment of the verity or availability of a government record either a Class A misdemeanor or a third degree felony, depending on the actor's intent. *See* TEX. PENAL CODE ANN. § 37.10 (Vernon 1974). Perhaps the failure of a notary to record an acknowledgment is such an impairment.

174. *See* TEX. R. EVID. 803(8) (public records not hearsay); 901 (authentication of public records); 902(4) (self-authentication of public record if certified as correct by custodian); 1005 (proof of public record by copy).

175. Texas Anatomical Gift Act, TEX. REV. CIV. STAT. ANN. art. 4590-2 (Vernon 1976 & Supp. 1987). Section 5(b) requires a non-testamentary anatomical gift document to "be signed by the donor, in the presence of 2 witnesses who must sign the document in [donor's] presence."

176. Natural Death Act, TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1987). Section 3(a) states:

> The directive shall be signed by the declarant in the presence of two witnesses not related to the declarant by blood or marriage and who would not be entitled to any portion of the estate of the declarant on his decease under any will of the declarant or codicil thereto or by operation of law. In addition, a witness to a directive shall not be the attending physician, an employee of the attending physician or a health facility in which the declarant is a patient, a patient in a health care facility in which the declarant is a patient, or any person who has a claim against any portion of the estate of the declarant upon his decease at the time of the execution of the directive. The two witnesses to the declarant's signature shall sign the directive.

177. TEX. PROB. CODE ANN. § 118A (Vernon Supp. 1987). Section (a) states that "[t]he

14. Conclusion of Ceremony

Action and Purpose: The attorney should indicate that the will execution ceremony is complete and, after thanking the witnesses and notary for their time, excuse them from the room.

C. After the Ceremony

The attorney's job is not finished once the actual ceremony is over. Several important items still need to be handled.

1. Confirm Testator's Intent

Action and Purpose: Since the client may have immediate second thoughts about his disposition plan once it is actually formalized, the attorney should talk with the testator and make certain that he understands what transpired and that he is still satisfied with the document as his last will. Any problems should be resolved promptly.

2. Make Copies of Will

Action: The attorney should make a copy of the executed will for his files. In addition, it is a nice gesture to ask the testator if he would like any copies and, if so, make those as well.[178]

Purpose: The attorney should retain a copy of the will for several reasons. First, it allows the attorney to inspect the will periodically to see if revisions are necessitated by a change in the law or the testator's circumstances. The practice of reviewing wills is one which every attorney should make a habit of doing. Unless the attorney knows the testator is now consulting another attorney regarding estate planning matters,

> it is not only [the attorney's] right, but it might even be his duty, to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will.
>
> Periodic notices might be sent to the client for whom a lawyer has drawn a will, suggesting that it might be wise for the client to re-examine his will to determine whether or not there has been any change in his situation requiring a modification of his will.[179]

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declaration must be attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration." Section (c) further requires that the declaration have "a self-proving affidavit signed by the declarant and the witnesses attesting to the competence of the declarant and the execution of the declaration."

178. *See* Johanson, *supra* note 2, at 13; J. PRICE, *supra* note 2, § 4.30, at 212 (suggests mailing copy of will rather than providing it to client at conclusion of ceremony).

179. ABA Comm. on Professional Ethics and Grievances, Formal Op. 210 (1941). *See also* L. CUSACK & T. SNEE, *supra* note 108, at 324-26 (periodic will review checklist and sample letter to client); J. PRICE, *supra* note 2, § 1.10 (discussion of subsequent communications between attorney and testator).

A second reason the attorney should keep a copy of the will is that the copy would be useful evidence of the will's contents if the original cannot be produced after death and there is sufficient evidence to overcome the presumption of revocation; as, for example, where the testator died in a fire which also destroyed his house where the will was kept.[180]

Making copies of the will for the client is a good way to provide a service which, although simple, will be appreciated since clients often do not have easy access to photocopying equipment. Providing copies at the conclusion of the ceremony also avoids the inconvenience and expense of mailing them at a later time.

By providing the client with a copy, he may be encouraged to place the original in his safe deposit box and keep the copy at home. This lessens the chance of the client making ineffective revisions to the will. It also allows the client to review his copy of the will without having to leave home.[181]

3. *Discuss Safekeeping of Original Will*

Action and Purpose: If the attorney has not previously discussed the safekeeping of the original will with the client,[182] he and the client now need to discuss where it is going to be kept. The attorney should stress to the testator the importance of storing the original will in a secure location,[183] but in a place where it will be easily and quickly found after his death.[184] Some testators may want to retain the original will at home or in a safe deposit box, while other testators may prefer that the attorney keep the will.[185] In other situations, the testator may want to deliver the will to the executor or deposit it with the probate court.[186] An attorney should be careful about suggesting that he keep the will

180. *See* TEX. PROB. CODE ANN. § 85 (Vernon 1980) (requirements to prove a written will not produced in court); Mingo v. Mingo, 507 S.W.2d 310 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (will presumed revoked if it was in possession of testator when last seen and it is not produced after death). *See generally* Johanson, *supra* note 2, at 13; RITCHIE, *supra* note 58, at 208.

181. Johanson, *supra* note 2, at 15.

182. It is better practice to resolve the safe-keeping issue prior to the day of the will ceremony.

183. 1 A. CASNER, *supra* note 95, at 143.

184. If the will was last seen in the possession of the testator or he had ready access to it, failing to produce the will at death raises the presumption that the will was destroyed with intent to revoke. Mingo v. Mingo, 507 S.W.2d 310, 311 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

185. If the attorney keeps the will, he should give the client a receipt for it; if the testator keeps the will, the attorney should get a receipt for it.

186. TEX. PROB. CODE ANN. § 71 (Vernon 1980). *See* Johanson, *supra* note 2, at 15 (deposit of will with clerk is inconvenient, raises practical problems, and is not widely used).

since it makes the original less accessible to the client and may result in pressure on the testator to hire the attorney to make changes to the will and on the executor or beneficiaries to hire the attorney to probate the will.[187]

4. Destruction of Prior Wills

Action and Purpose: If the testator had any prior wills, it is advisable to locate and destroy them to prevent evil-doing beneficiaries of earlier wills from concealing the new will. Even if the will is in the possession of another attorney, it is still good practice to contact the attorney on behalf of the testator and retrieve the will.[188] If, however, the testator's capacity is in doubt and the testator prefers the prior will to intestacy, it may be advisable to retain the prior will for use should the new will prove to be invalid.[189]

5. Give Post-Will Instructions to Testator

Action: The client should be provided with a list of post-will instructions.[190] This list should discuss at least the following:

a) The need to reconsider the will should testator's situation change, due, for example, to births or adoptions, deaths, divorces, marriages, significant changes in size or content of estate, or change of state of domicile.

b) An explanation that mark-outs, interlineations, and the like are insufficient to change the will.[191]

187. There is considerable controversy regarding the propriety and advisability of the attorney retaining the original will. *See, e.g.*, State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972) (court expressly disapproved of retention of will by attorney; attorney should keep will only "upon specific unsolicited request of the client"); Johanson, *supra* note 2, at 14-15 (resolution of issue depends on attorney's relationship with the particular client; discussion of pros and cons); J. FOONBERG, HOW TO GET AND KEEP GOOD CLIENTS 284-85 (1986) (highly recommends that attorney retain will; suggested form of "explanation" to give clients); J. PRICE, *supra* note 2, § 4.30, at 212 (retention of wills by attorneys is valuable service); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1980) (attorney should not influence client to name him executor of will).

188. *See* Johanson, *supra* note 2, at 15 (retrieving old will from former attorney benefits former attorney since wills may be on file which were written years ago for persons he has lost contact with; old wills cannot be thrown away and they cause storage problems).

189. 1 A. CASNER, *supra* note 95, at 144 n.16 (listing of possible reasons to retain revoked will).

190. *See* J. PRICE, *supra* note 2, § 4.31 (sample letter to testator covering post-will instructions and related matters).

191. *See* Leatherwood v. Stephens, 13 S.W.2d 726 (Tex. Civ. App.—Waco 1929), 24 S.W.2d 819 (Tex. Comm'n App. 1930, judgmt adopted) (majority agreed with lower court's dissenting opinion that obliterations made by the testatrix or anyone else after will was exe-

c) Instructions regarding safekeeping.[192]

d) The need to review the will should relevant state or federal tax laws change.

V. CONCLUSION

The will execution ceremony has been part of the exercise of the power of testation for thousands of years. The modern ceremony provides a means of proving the testator's testamentary intent, and portions of the ceremony are absolutely necessary to the validity of the will. Regrettably, the special character of this ceremony is often overlooked by the practicing bar. Since the will execution ceremony provides positive psychological benefits to the client, effectuates the client's intent, and may limit the attorney's exposure to malpractice liability, it is incumbent upon all attorneys to strive to provide their clients with properly conducted and memorable will execution ceremonies.[193]

The steps for an effective ceremony have been discussed in detail along with the reasons for those steps in the hopes that the attorney will be more likely to follow the steps if he understands the reasons behind them. Conducting a professional will execution ceremony is neither difficult nor expensive, and the additional effort it may take to do it correctly is definitely easier than defending a will contest or a malpractice action. Furthermore, the benefits, both present and future, of a properly conducted ceremony are awesome.

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cuted were ineffective); *see generally* 10 E. BAILEY, *supra* note 47, §§ 515-18; Comment, *supra* note 92, at 135.

192. *See supra* § IV.C.3.

193. "Any new estate planner whose mind rebels at such submission to ritual, might reflect that, all things considered, it is better to discipline one's mind than to ask attesting witnesses to lie under oath, later on, to validate the will." T. WATERBURY, MATERIALS ON TRUSTS AND ESTATES 244 (1986).