THE WILL

DISCLAIMER

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A will is the basic document for transferring property at the time of death. It is a testamentary document, meaning that it is written to take effect only after the death of the person who is making the will. Let's identify a few terms to start.

Terms

A *testator* is the person who makes the will. The feminine form of the term is *testatrix*, though in many places the term testator is used for both men and women. A person dies *testate* if they leave behind a valid will.

An *estate*, for our purposes, is the property that a person owns when he or she dies, both real estate and personal property. Property that transfers under a will is part of the *probate* estate. (See article on *Probate*.) The probate estate may not include all of a decedent's property. (Decedent means the person who has died.) Some property might transfer through other means, such as a payment-on-death or beneficiary designation on an account, or by joint tenancy, or in trust. Such other property may not be part of the probate estate. It may certainly be part of the decedent's taxable estate (See articles on *Inheritance Tax* and on *Transfer Taxes*) but it is not part of the probate estate.

A *beneficiary* is a person who receives property or a benefit under a will. (The term beneficiary is also used with respect to trusts and titling. See separate articles on *Trusts* and *Titling*.) You may also see the terms devisees, transferees, legatees, or heirs used to describe persons who receive property under a will.

A *bequest* is a gift of property made under the will. The term *devise* might also be used. There are different types of bequests, including a specific bequest, a general bequest and a residuary bequest. A *specific bequest* identifies particular property, i.e. the Southeast ¼ of Section 8-29-2, the Krause chisel plow, the New Holland chopper. A *general bequest* is typically a gift of money, though it can be other things, such as "any of the tractors." A *residuary bequest* is a gift from that part of the estate that remains after accounting for the specific and general bequests.

Requirements of Execution

We speak of the *execution* of a will, which means the signing of the will by the testator. The most common – and best – type of will is called a *self-proving will*, which essentially means that it was properly executed, i.e. signed and witnessed and notarized in a manner described under the law.[1] *Attestation* is a term used to describe the witnessing of the

[1] A self-proving will to some extent relieves the proponent of the will, typically the personal representative, of the burden of proving that the testator had testamentary capacity when making the will. It stands as

execution of the will. This kind of execution usually entails that the testator sign the will in front of two uninterested witnesses and a notary public, and that the testator initial each page of the will. A witness is uninterested if that person does not benefit from the will, i.e. is not going to receive anything under the will and has no personal stake in the validity of the will. (In Nebraska, an interested party, someone who will benefit or inherit under the will, can be a witness but that person is then limited to what they can receive under the will, i.e. no more than they would have received if the testator had died without a will. (See article on *Intestacy*.)

In Nebraska, any person 18 years of age or older can make a will.

A *holographic will* is one that is written in the testator's own handwriting. In Nebraska, it must also be signed. Witnesses are not strictly necessary, though certainly preferred, provided that the signature, the main language (the "material provisions") and the date are in the testator's handwriting. Even the date is not strictly necessary, if there is other evidence of the date or if the handwritten document is the only possible testamentary document.

A *codicil* to a will is a document that changes the will. It is like an amendment. It may delete parts of a will, or add to it. A codicil is subject to the same execution requirements as a will.

<u>What Goes into a Will</u>

A will may be the central document in a person's estate plan. It sets forth what the testator wishes to see happen to property at the time of death. What follows is a discussion of certain basic provisions that go into most wills.

The will identifies people and things. It names the testator. It identifies the testator's domicile, or home, which identification may have significant tax implications. It identifies the will as the testator's last will and revokes prior wills. It identifies the testator's family, typically naming the testator's spouse and all the children, whether or not they will all receive something as a beneficiary under the will.

A will provides for the payment of debts, funeral expenses and the costs associated with administering the estate through probate, and often identifies the funds for these payments. It can be important that a will expressly provide for the payment of secured debts. For example, is the debt against machinery or against the land to be paid before it is transferred to a beneficiary or is that person to take the debt with the property?

Most wills also provide for the payment of death taxes, whether state inheritance tax (as in Nebraska) or federal transfer taxes. (See separate articles on these subjects.) Depending on how extensive the tax burden is expected to be, this can be a very important part of a will and one which requires careful consideration. Most important, does the testator wish to identify the funds, or sources of funds, for the payment of taxes?

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evidence of that capacity. Should someone contest the will on grounds of lack of capacity, a self-proving will therefore puts the burden on that contesting party to prove that the testator lacked capacity.

Many wills call for payment of taxes out of the residuary estate. Of course, this might mean that those beneficiaries who are receiving property from the residuary estate will shoulder an unequal share of the taxes. Should certain beneficiaries receive their bequests without having to contribute to payment of taxes? What about property that is passing to beneficiaries outside of the probate, that is nonetheless included in the taxable estate? If all the liquid assets, for example, are being transferred through beneficiary designations, where will the funds come from to pay the taxes? In general, state law will apportion the tax burden according to the value of the property, and therefore the burden for payment of the taxes will fall by law to those beneficiaries who received the property. A will can change this apportionment.

Most wills contain provisions for transfer of specific items of tangible personal property. This provision in many wills refers to the testator's ability to prepare a separate document which describes certain items of tangible personal property and identifies the persons who will receive those items. This separate document should be dated and signed but does not have to be executed with the same formality as a will or a codicil. It cannot typically be used to make bequests of money, debt instruments, title documents, securities or property used in a trade or business. It cannot therefore be used to transfer machinery and equipment or livestock or titled vehicles. It is most often used to transfer personal possessions of the home, such as furniture, china, artwork, collections, etc.

The next part of a will usually contains the *specific bequests*. Specific bequests identify the beneficiary and the specific property that the beneficiary will receive. Land, machinery, livestock, accounts, etc. can form specific bequests. Specific bequests can play a part in tax planning, in particular in those estates sufficiently large to face a potential federal transfer tax liability. In such cases, the will typically provides for use of the unified credit and the marital deduction in making specific bequests. In a nutshell, a frankly simplistic nutshell, property of any value may be transferred to a surviving spouse under the marital deduction without having to pay transfer tax, whereas property transferred to someone other than the surviving spouse will use up unified credit in order to be exempted from transfer tax. It is in this part of a will that certain unified credit/marital deduction planning occurs, including provisions for the use of life estates, credit shelter trusts, marital deduction trusts, qualified terminable interest property trusts, generation skipping trusts, etc. Much of this kind of transfer tax planning has been made simpler by the recent enactment of the Portability Rule. (See articles on *Federal Transfer Taxes* and *Spousal Unified Credit Planning & the Portability Rule*.)

The typical will next includes provision for naming of fiduciaries (people entrusted to do certain things), including guardians for minor children and testamentary trust provisions. A *guardian* is someone appointed to protect the person (and sometimes the property) of an infant (minor), or of a person who is mentally incompetent or physically incapacitated. That person becomes the guardian's *ward*. A guardian is like a parent (who is in fact legally the "natural guardian" of a child). Naming of guardians is a momentous decision, one to be carefully considered.

This section of a will also often contains provision for creation of testamentary trusts, where needed. The most common and simplest example is a testamentary trust that is created for either minor children or, more commonly, minor grandchildren of predeceased parents. Who will look after the financial affairs – the inherited wealth – of minors, and for how long? Until they reach the age of majority (19 in Nebraska) or for time beyond that? The terms of the trust are typically laid out in this part of the will: what kind of powers does the trustee have, what standards and instructions govern what the trustee is to do for the beneficiaries? There is also usually a provision for waiving the requirement that a trustee provide a bond, and for payment of some kind of reasonable fee to the trustee.

The will names the personal representative, and, if possible a successor to act as personal representative should the first-named person be unwilling or unable to serve. The personal representative is the person charged with administering the estate as part of the probate and acting to accomplish the wishes of the testator as set forth in the will. (See *Probate* article for further discussion.) In choosing a personal representative, it is useful to consider the person's ability to interact with professionals, such as an accountant and a lawyer, their ability to follow through on tasks, deal with paperwork and to be levelheaded in the face of sometimes conflicting demands. Someone who can be firm without being antagonistic. An efficient personal representative can save costs in the administration of an estate.

Most wills contain a common disaster clause, which typically provides that if spouses die in a common accident, and it is not possible to determine who died first, each is deemed to have survived the other by 30 days with respect to the transfer of that spouse's assets.

What happens if the testator and a beneficiary other than the testator's spouse were to die at the same time? In order to prevent double probate, most wills provide that a beneficiary who does not survive the testator by at least 30 days is deemed to have predeceased the testator.

Some wills contain what is called an *in terrorem*, or no contest, clause. This is a clause that most will makers like: if any beneficiary fights about what the testator has provided in the will, that beneficiary's share of the inheritance is eliminated or reduced. Courts in general will not however hold such a clause against a beneficiary who has reasonable grounds for bringing a complaint. After all, if a person is actually cajoled or unduly influenced into changing a will to benefit a particular person, the court should not punish the party who brings such duress or dishonesty to the court's attention.

<u>Will Contest</u>

Speaking of complaints, let's discuss some of the common grounds for contesting the validity of a will. In addition to problems with execution of a will, and to questions about whether or not a will is the *last* will or has otherwise been revoked, the most common grounds have to do with the testator's capacity and intent.

A will contest is an effort to prevent a will from being probated or to undo the administration of the probate. In Nebraska, as in many states, a party can commence a will contest in a number of ways, from filing a claim in a probate that has already commenced to filing a separate formal probate proceeding. The common specific grounds for contesting a will include the following:

- Testamentary capacity: was the testator of a sufficient age and mental capacity to make a will. In Nebraska, as stated, the minimum age is 18. A lack of mental capacity can be shown through mental deficiency or mental derangement. Execution of a will generally requires an ability to know and understand the nature and extent of one's property, the persons whom one would be expected to favor as beneficiaries ("natural objects of one's bounty"), and what the will accomplished in terms of disposition of property.[2] *Ability* is not the same thing as actually recalling all of the facts of one's property or the names of all of one's heirs at the time of execution of the will. It means that one is capable of understanding these things, should they be brought to one's attention. Mental derangement is an incapacity in the form of an insane delusion. Not merely a delusion (believing something without grounds for that belief) but an insane delusion.

- Undue Influence: something that takes away the testator's free will in the execution of the will. Influence that causes a testator to change his or her mind is not necessarily undue. There must be some aspect of fraud or coercion which destroys the testator's free will and replaces it with that of the person applying the undue influence.[3]

- Fraud: There are two kinds of applicable fraud, *fraud in the inducement* and *fraud in the execution*. The former deals with intentionally misrepresenting facts that induce the testator to execute a will. The latter has to do with deceiving a testator as to what he or she is executing. Fraud in the inducement and undue influence often blend together.

- Mistake: Like fraud, there are two kinds of mistake that bear on testamentary capacity, *mistake in the inducement* and *mistake in the execution.* Mistake is typically self-induced, a misunderstanding of a fact or a law that induces a person to make a will, or some part of the will. Mistake in the execution would occur, for example, if spouses by mistake signed each other's wills.

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[2] One possesses testamentary capacity if she understands the nature of her act in making a will or a codicil thereto, knows the extent and character of her property, knows and understands the proposed disposition of her property, and knows the natural objects of her bounty. *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989).

[3] "One does not exert undue influence in a crowd. It is usually surrounded by all possible secrecy; it is usually difficult to prove by direct evidence; and it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition. In determining whether undue influence existed, a court must also consider whether the evidence shows that a person inclined to exert improper control over the testator had the opportunity to do so." *In re Estate of Hedke*, 775 N.W.2d 13, 278 Neb. 727 (Neb. 2009).

Additional Doctrines, Terms & Law

Ademption is a doctrine that has several aspects. In essence, it means that a bequest fails because the property is no longer part of the testator's estate at death. It comes in general in two shapes: ademption by satisfaction and ademption by implied revocation. The former occurs when a testator, prior to death, gives property to a beneficiary which a specific bequest gives to that same beneficiary under the will. Ademption by implied revocation occurs where the testator sells or otherwise disposes of property prior to death. So, if the testator's will leaves the ranch to his brother, but prior to death the testator sold the ranch, then the specific bequest of the ranch to the brother is adeemed by implied revocation. The brother is out of luck. The rule becomes murkier where the specifically bequeathed property was sold by a guardian or conservator, and not by the testator. The sale of property by an agent acting under a durable power of attorney is presumed to be the same as an act by the testator himself or herself. In trying to determine whether or not an ademption has occurred courts try to discover and accomplish the testator's intention.

Abatement is a doctrine under which some bequests are reduced to pay obligations of a higher priority. For example, if the testator leaves the tractor and baler to John and $50,000 to Jane, but dies owing debts of $20,000, then Jane's inheritance will likely be reduced by the $20,000 because her inheritance is a general bequest and John's is specific.

Lapse occurs where a beneficiary dies before the testator and the property that was to go to the predeceased beneficiary lapses and falls into the residuary estate. Most states, like Nebraska, have antilapse statutes. Under Nebraska's statute, the gift to a predeceased beneficiary will go to that person's issue (lineal descendants) in equal shares to the extent the issue are in the same degree of kinship with the predeceased beneficiary. (See article on Intestacy.)

A beneficiary may renounce a bequest, in whole or in part, through the timely filing of a written *renunciation*.

Someone who kills a person, or aids in the killing of a person, forfeits any inheritance they would receive by reason of that person's death.

A person who has custody of the will of a deceased testator, and who does not deliver that will either to the court or to the personal representative, becomes potentially liable for damages to the beneficiaries.

Joint Will or *Contract to Make a Will*. A contract to make a will is an agreement by the testator either to make a will or not to revoke or change a will. So, for example, Roger agrees to make a will which leaves the farm to Sharon, provided that Sharon takes care of Roger for the rest of his life. Roger makes such a will. Sharon takes care of Roger, but Roger later makes a new will to leave the farm to his nephews. Roger dies. Sharon

might have a claim under the law of contracts to the farm or for damages, even if Roger's second will was properly executed and made without undue influence.
The issue of will contracts sometimes arises in the context of what is called joint and mutual wills. For example, spouses each make a will. Each will reflects the other will, as is often the case with spousal wills, by leaving property first to the surviving spouse and then to the same people, typically the kids. It is possible for spouses to agree when making these wills that they will not revoke or change those wills after one of them has died. (This obviously has potentially serious consequences for the surviving spouse's ability to respond to changes in life and people.) In order to be enforceable, in general, there must be language in the will itself that contains the terms of the agreement or refers to a separate written contract, or there must be separate written evidence of the contract.

Where is a will kept?
Many people will simply keep their will with other important papers. Some people assemble end-of-life information and documents in a single place. Others place these papers in a safety deposit box. Another possibility is to deposit the will with the county court, which maintains a confidential will depository. It is important that the personal representative know where the will and other end of life papers are kept. If they are deposited in safety deposit box, it is important that someone can gain access to that deposit box without the need to go into court to gain authority.

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