
Section 2. Creating a Will

1. Terminology

- a. **Will:** An instrument setting forth a person's intent to dispose of their property in a specific manner upon death.
- b. **Codicil:** An instrument executed after the creation of a will which alters or modifies the will.
 - i. **Note:** All of the requirements for executing a will specified below apply to codicils as well.
- c. **Testator:** *Defined previously.*
- d. **Testate:** *Defined previously.*
- e. **Beneficiary:** *Defined previously.*
- f. **Executor:** Someone who is appointed in the will or by the court to administer the testator's estate.
- g. **Probate Proceeding:** Judicial process of determining the validity of a will.
- h. **Probate Estate/Assets:** Property of the testator which does not pass by operation of law or intestacy.

2. Requirements for Creating a Validly Executed Will

- a. (1) Testator must be over the ***age of majority*** (i.e. 18+ years old);
- b. (2) Testator must have ***testamentary capacity*** at the time of the will's creation (discussed later in the outline);
- c. (3) The will must be ***in writing, signed and dated***
 - i. **In Writing:** In the majority of states a will must be made in writing (as opposed to orally).
 - ii. **Signed:** In the majority of states the will must be signed by the testator.
 - 1. **Signed at the Bottom:** The majority of states require that the testator place his signature at the bottom of the document.
 - 2. **Signature by Proxy:** If the testator is unable to sign the will because of a physical handicap, another person, acting at the direction and in the presence of the testator, may do so.
 - iii. **Dated:** In the majority of states the testator must date the will.
- d. (4) The will must be signed by ***two witnesses*** in the ***testator's presence***.
 - i. **Two Witnesses:** Two or more witnesses must sign the will.
 - 1. **Holographic Wills:** In some states an ***unwitnessed will*** made completely in the ***testator's handwriting*** will be admitted to probate.
 - ii. **Testator's Presence:** Testator does not actually need to see the witnesses sign as long as they are in his ***presence***. Presence is defined as being so near to the testator that he is conscious of where they are and what they are doing (this is known as the ***conscious presence test***).
 - 1. **Note:** The witnesses must sign in the testator's presence, but ***the witnesses need not sign in each other's presence, nor does the testator need to sign the will in the witness's presence*** (he can just acknowledge his signature or the document as being his will).

3. Interested Witness Statute

- a. **Rule:** Any bequest to a witness who is to inherit under the will is void.
- b. **Exceptions:**
 - i. **More than two witnesses:** The bequest will not be void if there were more than two attesting witnesses, and at least two were not interested.
 - ii. **Interested witness is an intestate distributee:** If an interested witness would have also been an intestate distributee, the ***witness will inherit the lesser of (1) the bequest in the will or (2) the amount the witness would have received through intestate distribution.***

4. Foreign Wills

- a. **Rule:** A will shall be admitted to probate even if it was not executed with the necessary formalities required by the jurisdiction in which it is being admitted if (1) it was ***executed in accordance with the law of the state in which it was created, or (2) the will complies with the laws of the state in which the testator was domiciled at death.***

5. Conditional Wills

- a. **Definition:** The circumstances surrounding the drafting of the will could be construed as making it conditional on the happening of an event (which does not occur).

- i. **Ex:** Husband drafts a will before he goes skydiving which states that if he dies while skydiving he wants his estate to be bequeathed to Son.
 - b. **Rule:** The court will look to the *intent* of the testator to determine if **(1)** the testator predicated the creation of the will on the event's occurrence (thereby causing the will to terminate upon the failure of the condition in question), **or (2)** that the coming of the referenced event spawned his desire to finally create a will (thus making it a final expression of how he'd like his estate distributed upon his death regardless of the event's occurrence).
6. **Incorporation by Reference-Extrinsic Documents**
 - a. **Extrinsic Document:** A document that is separate from the will.
 - b. **General Rule:** The terms of an extrinsic document which have been referred to in a will shall be incorporated by reference if **(1)** the instrument was *in existence* at the time the will was executed, **(2)** the will shows an *intent to incorporate* the document's terms, and **(3)** the document is *clearly identified* by the language in the will.
7. **Contractual Wills (joint and mutual wills)**
 - a. **Definition:** These are either **(1)** a will of two or more persons placed on one document (e.g. joint will), or **(2)** separate wills made by two or more persons all containing reciprocal provisions (e.g. mutual wills). These wills are deemed "contractual" because they evidence an agreement between the parties that no party shall later execute their own separate will.
 - b. **Effect of Contractual Wills:** If a will is found to be contractual once a party to the contractual will dies, the survivor(s) are prevented from executing a new will (e.g. the terms of the original will become forever binding on how the survivor(s)'s estate will be distributed).
 - i. **Note:** If none of the parties has died, each is free to execute a separate will, and that will shall be given full effect.
 - c. **Factors used to determine if a will is Contractual:**
 - i. The will expressly states that it is contractual.
 - ii. Will is labeled "joint and mutual".
 - iii. Will leaves entire estate to survivor.
 - iv. Will disposes of all of their property in a unified disposition.
 - v. There is a common dispositive scheme on the death of the survivor.
8. **Contract to Create a Will**
 - a. **Definition:** This is an agreement by a person to bequeath property to another by will in consideration for that person's services.
 - b. **Rule:** The person attempting to prove the agreement must do so by *clear and convincing evidence*.