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Technical Aspects of a Will: A Guide to Valid Execution and Revocation in Illinois and the Sunbelt States, 5 J. Marshall J. of Prac. & Proc. 126 (1971)

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COMMENTS

TECHNICAL ASPECTS OF A WILL: A GUIDE TO VALID EXECUTION AND REVOCATION IN ILLINOIS AND THE SUNBELT STATES

INTRODUCTION

FOR SALE: Five acres of beautiful ranch land in sunny Arizona. Ideally situated for investment or retirement purposes.

This common advertisement is directed to those individuals who envision the day when their labors are behind them and their dreams of relaxation and enjoyment in that paradise of fresh air and water, so artistically described by the advertisement, can be fulfilled. Many may purchase such real estate for investment as well as for retirement purposes. In either case such property may be the subject of a testamentary devise in a will.

It is a well established rule that the laws governing the testamentary devise of realty are those of the state in which the real estate is situated,¹ while the law of the domiciliary state governs as to personal property. It is frequently provided by statute² that a will admitted to original probate in a foreign jurisdiction can be admitted to ancillary probate in the state of situs of the real estate upon presentment of a certified copy of the will, together with a certified transcript of the proceeding in the foreign court. Such a will may be admitted without a hearing on the merits;³ however, problems arise where, subsequent to the execution of the will, testator acquires a domicile in the state where the real estate he purchased is situated. For example, if the land were in Florida, prior foreign probate is prohibited, and the original probate is *required* by statute to be in Florida.⁴ There are criminal sanctions for aiding or procur-

¹ RESTATEMENT (First) of CONFLICT OF LAWS §249 (1934). United States v. Fox, 94 U.S. 315 (1876). This rule is justified on the theory that it prevents the introduction of confusion into land titles, which should be kept as nearly uniform as possible. Furthermore, as each state is a sovereign, to allow lands within the borders of the states to be extraterritorially controlled would conflict with the dignity and independence of state action.

² ARIZ. REV. STAT. §14-343 (1956). FLA. STAT. ANN. §734.31 (1964). CAL. PROBATE CODE §362, (West 1956). ILL. REV. STAT. ch. 3, §87 (1969).

³ *Id.*

⁴ FLA. STAT. ANN. §732.36(1) (1964):

From and after the effective date of this section no person or corporation shall procure, or aid, abet or assist another in procuring, the probate of the estate or will of a person who heretofore has died a resident of this state or of a person who hereafter dies a resident of this state, in any other state or country prior to the probate of such estate or will in this state.

ing an original probate in foreign jurisdiction by one domiciled in Florida.⁵ Thus, if the will does not satisfy the execution requisites of the state of Florida, the wishes of the testator will be frustrated, as that portion of the will disposing of realty will be null and void.⁶ Therefore, the careful draftsman will seek to satisfy the requirements of all states in which the testator may reside at the time of execution of the will.

There would be no problem in admitting a validly executed Illinois will to probate in Florida, Arizona, or California (or any other state for that matter) if these states had adopted, as did Illinois,⁷ the Uniform Foreign Executed Wills Act. This act permits a written will to be admitted to probate if it 1) has been admitted to probate in another state or 2) has been executed in conformity with the laws of the state a) where the testator is domiciled at the time of execution or b) where the testator died.⁸ The purpose of this comment is to provide necessary information on the technical aspects of the preparation of a will so as to satisfy the execution requirements of not only Illinois, but also Arizona, California and Florida.⁹

TESTAMENTARY CAPACITY

Every person of the age of eighteen has testamentary power in California,¹⁰ Florida,¹¹ and Illinois.¹² Arizona¹³ requires a person to be at least twenty-one if unmarried, to be lawfully married, or eighteen and in the United States armed forces. In order to validly exercise this testamentary power, a person must

⁵ FLA. STAT. ANN. §732.36(2) (1964):

Any person or corporation who shall knowingly and intentionally procure, or aid, abet or assist another in procuring, the probate of the estate or a will of a person who heretofore has died a resident of this state or of a person who hereafter dies a resident of this state, in any other state or country prior to probate of such estate or will in this state, shall be guilty of a misdemeanor, and upon conviction therefor, shall be subject to a fine not exceeding five thousand dollars.

This provision has not been tested in the Florida Supreme Court. Thus, even though the writers feel it may be unconstitutional, the careful draftsman will execute the will in compliance with Florida standards to avoid adverse consequences from a possible failure to upset the constitutionality of this provision.

⁶ FLA. STAT. ANN. §731.07(3) (1964). This is also true in California by statute. See CAL. PROBATE CODE §26 (West 1956).

⁷ ILL. REV. STAT. ch. 3, §85 (1969).

⁸ MODEL EXECUTION OF WILLS ACT, §7, 9A U.L.A. 657 (1940).

⁹ The discussion is centered on these three states since they are states which are renowned for being retirement havens. This may be attributable to the climatic conditions existing in these three states and the general appeal made by these states to those of retirement age.

¹⁰ CAL. PROBATE CODE §20 (West 1956).

¹¹ FLA. STAT. ANN. §731.04 (1964).

¹² ILL. REV. STAT. ch. 3, §42 (1969).

¹³ ARIZ. REV. STAT. §14-102 (1956).

possess "testamentary capacity": the mental ability to make and execute a will.¹⁴

The test for testamentary capacity which is provided by the cases was summarized in the Florida case of *In re Coles' Estate*.¹⁵ There, the testatrix, a resident of Illinois, executed a valid will before moving to Florida. The following year, testatrix, then domiciled in Florida, purported to make another will while in a hospital undergoing treatment for a terminal illness. This will was executed shortly after the testatrix had been injected with dilaudid, a drug that affects the reasoning processes and usually produces a state of stupefaction. The reviewing court, in affirming the judgment of the lower court granting a petition for revocation of the Florida-executed will, held that the testatrix lacked testamentary capacity at the time of execution of the Florida will. The court further stated that:

Testamentary capacity . . . requires merely the ability of the testator to understand in a general way the nature and extent of the property to be disposed of, his relation to those who would naturally claim a substantial benefit from his will, and the practical effect of his will as executed.¹⁶

Illinois deems one who is capable of transacting ordinary business affairs as capable of making a valid will.¹⁷

Testamentary capacity is determined at the time of exe-

¹⁴ Illinois refers to testamentary capacity in ILL. REV. STAT. ch. 3, §42. (1969) as "sound mind and memory".

¹⁵ 205 So. 2d 554 (Fla., 1968).

¹⁶ *Id.* at 555. One would expect that a fairly high standard of mental competence is required. But, before one accepts this conclusion, he should consider the following cases: In *Estate of Ross*, 204 Cal. App. 2d 82, 22 Cal. Rptr. 135 (1962), the Appellate Court affirmed the summary judgment rendered by the trial court which found that the testatrix did not lack testamentary capacity. The evidence tended to show that testatrix had attempted suicide on many different occasions (she eventually succeeded), that she was addicted to barbituates, that she may have suffered brain damage from an overdose of such, that she had recently received extensive psychiatric treatment and that she was under the influence of "bennies" the day preceding the execution of the will.

The Arizona Supreme Court in the case of *In re Estate of Still*, 93 Ariz. 302, 380 P.2d 601 (1963), found no lack of testamentary capacity where the uncontroverted evidence tended to show that testatrix shrieked and screamed at all hours of the night, rarely combed her hair, bathed or changed clothes and, on occasion, exposed herself in the presence of neighborhood children. She affirmed beliefs in black magic and the power of thought which could be used to cast spells and "hex" her enemies. She frequently declared that the members of the church on the corner were praying for her to die so that the church could acquire her property. In addition, she frequently walked along her property line sticking out her tongue at the children while gesturing to them to get away from her property.

The Arizona Supreme Court found that "testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal, unless they directly bear upon and influence the testamentary act." *Id.* at 306, 380 P.2d at 603.

¹⁷ Both *v. Nelson*, 46 Ill. App. 2d 69, 196 N.E.2d 530 (1964), *rev'd* on other grounds 31 Ill. 2d 511, 202 N.E.2d 494 (1964). According to the California Supreme Court however, the ability to transact business is *not* the legal standard of testamentary capacity. See *In re Sexton*, 199 Cal. 759, 251 P. 778 (1926).

cution of the will, and evidence of prior or subsequent incapacity is material only insofar as it tends to show the mental condition of the testator at the time of execution of the will.¹⁸ Thus, in the case of *In re Walter's Estate*,¹⁹ the Arizona Supreme Court found that the seriously injured testator had testamentary capacity to execute a will even though shortly after the execution of the will he failed to understand a request from an attorney to sign a more formally drafted document.

In *Heasley v. Evans*,²⁰ the Florida Appellate Court considered the contention of a will contestant that testamentary capacity was lacking where the "testatrix was physically frail, lame, poor of eyesight, senile, forgetful, flighty, penurious and possessed of but little knowledge of the extent and nature of her possessions."²¹ The court, in refusing to grant a petition for revocation held that "[M]ere old age, physical frailty or sickness, failing memory, or vacillating judgment are not inconsistent with testamentary capacity if the testator possessed the testamentary prerequisites"²²

Chronic alcoholism²³ or drug usage do not prima facie establish lack of testamentary capacity. Even one who is insane²⁴ may possess testamentary capacity. Testator is presumed to

¹⁸ *In re Estate of Cole*, 205 So. 2d 554 (Fla., 1968). *In re Estate of Stitt*, 93 Ariz. 302, 380 P.2d 601 (1963). *In re Ross*, 204 Cal. App. 2d 82, 22 Cal. Rptr. 135 (1962). *Bailey v. Oberlander*, 329 Ill. 568, 161 N.E. 65 (1928).

¹⁹ 77 Ariz. 122, 267 P.2d 896 (1954).

²⁰ 104 So. 2d 854 (Fla. 1958).

²¹ *Id.* at 856.

²² *Id.*

²³ Thus, in *Fernstrom v. Taylor*, 107 Fla. 490, 145 So. 208 (1933), the Florida Supreme Court held that a will drafted by an admitted alcoholic testator was valid since "the fact that he is habitually intoxicated or uses alcohol frequently, or has even been declared an habitual drunkard does not necessarily deprive him of testamentary capacity." *Id.* at 492-93, 145 So. at 209. For an extended discussion on how testamentary capacity is affected by the use of intoxicating liquors or drugs, see 9 A.L.R.3d 15.

²⁴ The court in *Estate of Sexton*, 199 Cal. 759, 251 P. 778 (1926), said:

"Insanity" is a broad, comprehensive, and generic term of ambiguous import. In a medical sense, it is used to denote any unsound and deranged conditions of the mind, and every degree of mental unsoundness, whatever may be its source or cause. [citations omitted]. But mere proof of mental derangement, or of insanity in a medical sense, is not sufficient to invalidate a will. Not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity. The contestant is required to go further than that. He must either show such a complete mental derangement as denotes utter incapacity to know and to understand those things which a testator must be able to know and to understand in order to possess testamentary capacity, or he must show the existence of a specific insane delusion which affected the making of the will in question. In other words, mental derangement sufficient to invalidate a will must be an unsoundness of mind in one or two forms: (1) Mental unsoundness of such broad character as to establish incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. And, even in the latter class of cases, it is not sufficient merely to establish that the testator was the victim of some hallucination or delusion.

Id. at 763, 251 P. at 780.

have testamentary capacity, and the burden of rebutting this presumption by clear and convincing evidence is on the contestant.²⁵

STATUTORY REQUIREMENT FOR EXECUTION

Arizona,²⁶ California,²⁷ Florida,²⁸ and Illinois²⁹ have statutorily prescribed certain formalities to be followed in executing a valid will. Since Illinois,³⁰ unlike the other three states,³¹ does not recognize non-cupative wills,³² and since holographic wills³³ must be executed in Illinois in conformity with statutory requirements, the discussion of execution requirements necessarily will be restricted to formal, witnessed wills.

The statutory formalities for the execution of a valid formal will in the four states can be briefly summarized as follows: The will must be: 1) in writing,³⁴ 2) signed at the end by the testator or by another who signs in the testator's presence and at his direction³⁵ and 3) attested to by three³⁶ competent witnesses

²⁵ *In re Estate of Walker*, 77 Ariz. 122, 267 P.2d 896 (1954). *Estate of Locknane*, 208 Cal. App. 2d 505, 25 Cal. Rptr. 292 (1962); *Shevlin v. Jackson*, 5 Ill. 2d 43, 124 N.E.2d 895 (1955). Note however that Florida is *contra* by statute. FLA. STAT. ANN. §732.31 (1964):

In all proceedings contesting the validity of a purported will, whether before or after such will is admitted to probate, the burden of proof, in the first instance, shall be upon the proponent thereof to establish, *prima facie*, the formal execution and attestation thereof, whereupon the burden of proof shall shift to the contestant to establish the facts constituting the grounds upon which probate of such purported will is opposed or revocation thereof is sought.

²⁶ ARIZ. REV. STAT. §14-121 (1956).

²⁷ CAL. PROBATE CODE §50 (West 1956).

²⁸ FLA. STAT. ANN. §731.07 (1964).

²⁹ ILL. REV. STAT. ch. 3, §43 (1969).

³⁰ With the requirement in §43 that all wills must be in writing and the omission of any provision providing for non-cupative wills, it may be assumed that non-cupative wills are inoperative under the act. See 2 JAMES, ILLINOIS PROBATE LAW AND PRACTICE §43.14 at 433 (1961).

³¹ ARIZ. REV. STAT. §14-124, 14-125 (1956). CAL. PROBATE CODE §54, 55 (West 1956). FLA. STAT. ANN. §731.06 (1964).

³² A non-cupative will is a will made orally during the last illness of the testator or by one injured or in expectation of imminent death. It may be made by a soldier in the field or sailor at sea in fear of, or actual contemplation of, death. It usually is limited to the disposal of personal property. California law, unlike Arizona and Florida, restricts disposal of personal property to that which is less than \$1,000 in value.

³³ A holographic will, recognized by statute in Arizona §14-123 and California §53, is one written entirely in the handwriting of the testator. Arizona and California permit such wills to be executed without compliance with statutory formalities as to witnesses and subscription. Generally the draftsman need not be concerned with such wills. However, rare occasions, such as an emergency, may necessitate a lawyer drafting or dictating by telephone a will to be executed in holographic form. The lawyer should then advise the client to copy, date, and sign the will provisions on blank paper in his own handwriting.

³⁴ This should not be confused with the holographic will (*supra* note 33). This requirement means that there must be some tangible evidence of the testamentary act.

³⁵ ARIZ. REV. STAT. §14-121 (1956). FLA. STAT. ANN. §731.07 (1964). ILL. REV. STAT. ch. 3, §43 (1969). CAL. PROBATE CODE §50 (West 1956).

³⁶ While the four states require only two subscribing witnesses, the care-

who subscribed at the end of the will in the presence of the testator. It should be remembered that the purpose of such requirements is not to discourage testamentary disposition, but to provide a check against the probate of fraudulent wills and to provide a means of determining the authenticity of wills. Thus, these formalities cannot and should not be waived or disregarded.³⁷

A testator may sign a will in any of the following ways:

- 1) He may personally subscribe his own name³⁸ or his own mark.³⁹
- 2) He may have another subscribe his name at his request and direction.⁴⁰
- 3) He may have another guide his hand.⁴¹

Florida⁴² and California⁴³ require testator's signature to be at the "end of the will." A will is signed "at the end" when testator's signature appears below all the disposing portions of the will.⁴⁴ Illinois and Arizona have no statutory requirement that the signature be at the end, and the case law⁴⁵ has found the place of the signature to be immaterial so long as the signa-

ful draftsman will require three witnesses to the will so as to fulfill requirements of Connecticut, Massachusetts, Maine, New Hampshire, South Carolina and Vermont, which require three witnesses to wills. Prentice Hall, ESTATE PLANNING §1025 (1971).

³⁷ Estate of Howell, 50 Cal. 2d 211, 324 P.2d 578 (1958). *In re* Estate of Olson, 181 So. 2d 310 (1966); Estate of Tyrrell, 17 Ariz. 418, 153 P. 767 (1915).

³⁸ ARIZ. REV. STAT. §14-121 (1956). CAL. PROBATE CODE §50(1) (West 1956). FLA. STAT. ANN. §731.01 (1964). ILL. REV. STAT. ch. 3, §43 (1969).

³⁹ In Estate of Williams, 182 So. 2d 10 (Fla. 1965), testator was permitted to sign his will by making an "X" mark. See also Estate of CeCala, 92 Cal. App. 2d 834, 208 P.2d 436 (1949).

⁴⁰ ARIZ. REV. STAT. §14-121 (1956). CAL. PROBATE CODE §50(1) (West 1956). FLA. STAT. ANN. §731.07 (1964). ILL. REV. STAT. ch. 3, §43 (1969). Even though all the statutes sanction it, this method of subscription should be employed only when it is absolutely necessary.

⁴¹ The validity of a will is not impaired if testator's physical weakness necessitates someone guiding his hand when he signs. Such assistance is preferred to another person signing at testator's direction. The general rule is that so long as there is the conscious wish of the testator that his hand should make the signature, and he participates in any degree in the making of it and acquiesces in and adopts the signature thus made, it is sufficient. Estate of Halloway, 195 Cal. 711, 235 P. 1012 (1925). *In re* Estate of Kohl, 397 Ill. 251, 73 N.E.2d 437 (1947).

⁴² FLA. STAT. ANN. §731-07 (1964).

⁴³ CAL. PROBATE CODE §50(1) (West 1956).

⁴⁴ This requirement is designed to prevent the subsequent addition of a dispositive provision without complying with the formalities of execution. Thus, in Estate of Howell, 50 Cal. 2d 211, 324 P.2d 578 (1958), a will was held invalid where there was an unreasonably large blank space between the body and the signature. However, a signature in the attestation clause was held to be a signature "at the end" in the case of *In re* Estate of Schiele, 51 So. 2d 287 (Fla. 1951).

⁴⁵ *In re* Estate of Machay, 45 Ill. App. 2d 89, 195 N.E.2d 18 (1964); *In re* Estate of Harris, 38 Ariz. 1, 296 P. 267 (1931).

ture was placed with an intent to authenticate the instrument as a testamentary act.⁴⁶

The statutory requirement that a will be signed is specifically satisfied if the testator acknowledges the execution of the instrument.⁴⁷ The case law of the four states does not require a testator to use any particular form of words in acknowledging his signature.⁴⁸ The general rule was stated in the Illinois case of *Conway v. Conway*⁴⁹ where the Illinois Supreme Court stated that:

[A]ny act, sign or gesture will suffice which indicates an acknowledgment of the instrument with unmistakable certainty. It is enough if the testator acknowledges to the witnesses, either by words or acts, that the instrument in question is his act or deed.⁵⁰

Thus, there may be proper attestation even where the testator does not sign in the presence of the witnesses. Witnesses, however, must attest in the presence of the testator to comply with statutory requisites.

The case law of the states is in conflict on the meaning of the word "presence" in connection with the execution of wills. California in the case of *In re Tracy's Estate*⁵¹ adopted what is known as the "conscious presence" rule. This rule suggests that the testator need not actually view the signing by the witnesses, but that: 1) the witnesses must sign within the testator's hearing, 2) the testator must know what is being done, and 3) the signing by the witnesses and the testator must constitute one continuous transaction.⁵² Illinois, taking a contrary position in *Walker v. Walker*,⁵³ held that witnesses did not sign in the presence of the testatrix where the testatrix was situated in a car about thirty-five feet from a window through which she could see the witnesses standing around a table upon which the will lay. The Supreme Court stated that

[I]t is not enough for the testator to be able to judge from such act as he may see that the witnesses were signing his will. It is essential to the attestation which the law requires that the testator have the opportunity of seeing the very act of attestation, the will, the witnesses and their act.⁵⁴

⁴⁶ *Id.*

⁴⁷ ILL. REV. STAT. ch. 3, §69 (1969). ARIZ. REV. STAT. §14-121 (1956). FLA. STAT. ANN. §731.07(2) (1964) (amended 1965). CAL. PROBATE CODE §50 (West 1956).

⁴⁸ The Florida Supreme Court in *Ziegler v. Brown*, 112 Fla. 421, 150 So. 608 (1933), held that a will was properly executed by one unable to speak where the mute testatrix indicated by gestures that she was satisfied with the will and made her mark on the instrument in gesturing to the witnesses to sign.

⁴⁹ 14 Ill. 2d 461, 153 N.E.2d 11 (1958).

⁵⁰ *Id.* at 468.

⁵¹ 80 Cal. App. 782 (1947).

⁵² *Id.*

⁵³ 342 Ill. 376, 174 N.E. 541 (1931).

⁵⁴ *Id.* at 383.

The careful draftsman will permit attestation by the witnesses outside of the testator's presence⁵⁵ only when it is *absolutely* necessary. Also, when some other person signs for the testator, the direction to sign should be given and the signing done in the presence of the witnesses in order to negate any possibility of fraud or undue influence. For obvious reasons, one other than the testator should sign only when it is absolutely necessary to do so. It is not essential to the validity of the will in Arizona⁵⁶ or Illinois⁵⁷ that the testator tell the witnesses that they are subscribing to a will. However, it would seem to be the better rule that the testator should advise the witnesses that the document to which they are attesting is a will.⁵⁸

The testator should sign or acknowledge his signature before the witnesses attest even though the case law of Illinois and California does not require it.⁵⁹ The Illinois Supreme Court in *Brelie v. Wilkie*⁶⁰ held that the order of signing is irrelevant so long as the testator and the witnesses sign as part of the "same transaction." However, the testator should sign first to avoid any possible problems.⁶¹

PROCEDURE FOR THE EXECUTION OF THE WILL

The following procedure meets the formal requirements of execution of the four states and most, if not all, other states:

- 1) The testator, three disinterested witnesses, and the draftsman of the will should be seated around a table.
- 2) The draftsman should request that all present remain closely attentive to the proceedings.

⁵⁵ This includes physical and mental presence. For example, witnesses could not attest to a will in the presence of a sleeping testator. See 1 REDFERN, WILLS AND ADMINISTRATION IN FLORIDA §78 at 127-131 (1966) for a general discussion of this problem.

⁵⁶ *In re Estate of Harris*, 38 Ariz. 1, 296 P. 267 (1931).

⁵⁷ *In Conway v. Conway*, 14 Ill. 2d 461, 153 N.E.2d 11 (1958), witnesses were requested to attest to the testator's signature unaware that they were witnessing a will. The Illinois Supreme Court found that it is not indispensable to a proper attestation that the witnesses know that they are witnessing a will.

⁵⁸ California requires by statute that the testator declare the instrument to be his will. CAL. PROBATE CODE §50(3) (West 1956): "The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will." This requirement was liberally construed in the case of *In re Estate of McKague*, 204 Cal. App. 2d 370, 22 Cal. Rptr. 363 (1962), where the court held that even though the testator had not formally declared that the instrument was his will, the testator had complied with the statute where his conduct and actions unmistakably indicated that the witnesses were attesting to a will.

⁵⁹ *In re Estate of Hoffman*, 137 Cal. App. 555, 290 P.2d 669 (1955).

⁶⁰ 373 Ill. 409, 26 N.E.2d 475 (1940).

⁶¹ A distinguished Florida attorney is of the opinion that the Supreme Court of Florida, if it were to pass on the question, would rule that the testator must sign first. See 1 REDFERN, WILLS AND ADMINISTRATION IN FLORIDA, §6.03 at 100 n. 3 (1966).

3) The testator should re-examine the instrument at this time⁶² and declare to all present that the instrument is his will.

4) Testator should request the witnesses to observe and attest to the will.⁶³ The attorney may handle this procedure by asking the testator the following questions: a) "Mr. (testator's name), is this document a correct statement of your wishes?"; b) "Mr. (testator's name), do you wish this document to be your will?"; c) "Mr. (testator's name), do you wish (name the three witnesses) to act as witnesses to your will?" Testator should affirmatively respond to each question as posed.

5) The testator should sign the will at the end as his name appears in the title and the introductory clause. The witnesses should position themselves so as to be able to actually see the testator subscribe.

6) The attorney (or a witness) should then read the attestation clause aloud. Each witness should assent to it as an accurate statement and sign his full name and address below the attestation clause in the presence of the other witnesses.

It should be pointed out that an attestation clause is not legally necessary; however, a proper attestation clause, duly signed and attested, raised a *presumption* of legal execution.⁶⁴ The following clause would meet the requirements of any state:

The foregoing instrument was signed, sealed, declared, and published by the above named testator as his last will and testament in the presence of us, the undersigned, who, at his special instance and request, do attest as witnesses, after said testator has subscribed his name thereto, and in his presence and in the presence of each other.

Signed: Witness _____

There is no requirement that every page of the will be

⁶² Testator could have re-examined such instrument before the witnesses arrived.

⁶³ According to BLACK'S LAW DICTIONARY 163 (4th ed. 1951), to attest means to signify by subscription of his name that the signer has witnessed the execution of the particular instrument.

⁶⁴ Thus, such a clause is very important since it may entitle a will to be probated where the burden of showing due execution might be rather difficult; for example, where the witnesses cannot testify. The effect of such a clause was stated in the case of *In re Estate of Pitcairn*, 6 Cal. 2d 730, 59 P.2d 90 (1936), where the court stated that:

[A] regular and complete attestation clause makes out a prima facie case of due execution of the will. The authorities have clearly recognized that where witnesses are dead, unavailable or unable to testify or recollect, or are adverse or corrupt, it is necessary to rely upon other evidence of the sufficiency of the instrument, and accordingly have applied the above mentioned presumption.

Id. at 732, 59 P.2d at 92. See also, *Brelie v. Wilkie*, 373 Ill. 409, 26 N.E.2d 475 (1940).

signed or initialed, and there is no legal effect in so doing.⁶⁵ However, it is advisable to number and initial each of the pages. This will discourage any substitution of pages subsequent to the execution of the will.⁶⁶ It is necessary to discourage informal alterations, since the substitution of pages or the insertion of additional pages without complying with statutory formalities is invalid and inoperative as a testamentary disposition. The difficulties created by improperly attempted alterations of the will are obvious.

INCORPORATION BY REFERENCE

Extrinsic documents can be incorporated into the will by the application of the doctrines of incorporation by reference and facts of independent significance.⁶⁷ Such documents may be incorporated even though they are not executed in accordance with statutory formalities required for the execution of a will.⁶⁸ The application of these doctrines enables the draftsman to use the invaluable estate planning device, the pour-over will with the revocable inter vivos trust.⁶⁹

The general requisites for the application of the doctrine of incorporation by reference were stated in the Illinois case of *Bottrell v. Spengler*.⁷⁰ In that case, the contestant sought to admit to probate deeds referred to in the will on the grounds that the deeds were incorporated by reference. The Illinois Supreme Court, in denying the contention, held that the will failed to show the necessary intent to incorporate the deeds in question. The court further stated:

In order so to incorporate three things are necessary. First, the will itself must refer to such paper to be incorporated (a) as being in existence at the time of the execution of the will, (b) in such a way as to reasonably identify such paper in the will, and (c) in such a way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof. Second, such document must, in fact, be in existence at the time of the execution of the will and must be shown to be the instrument therein referred to.⁷¹

It is necessary that the document be in existence when the doctrine of incorporation by reference is applied since any writing to be prepared in the future could not be signed or attested

⁶⁵ 1 THOMAS, FLORIDA ESTATES PRACTICE GUIDE ch. 3, §5 (1969).

⁶⁶ *Id.*

⁶⁷ *FOXWORTH v. YATES*, 240 Cal. App. 2d 784, 50 Cal. Rptr. 237 (1966).

⁶⁸ *Id.* at 789, 50 Cal. Rptr. at 240.

⁶⁹ A revocable inter vivos trust is designed to receive assets from the testator's estate. The terms of the trust will govern the administration of the assets "poured-over" into the trust.

⁷⁰ 343 Ill. 476, 175 N.E. 781 (1931).

⁷¹ *Id.* at 478, 175 N.E. at 782.

to at the time the will was made.⁷² The requirement that the will identify the document incorporated by a sufficiently certain description is satisfied if the identification made is reasonably certain, and extrinsic evidence is admissible to aid in the identification. Mere reference to an outside document is insufficient.⁷³ There must be an affirmative showing of an intent to incorporate the document as part of the will.⁷⁴ Thus, the will should state explicitly that the testator intends to incorporate the particular document by reference.

Prior to the enactment of statutes authorizing "pour-over" into a revocable inter vivos trust, courts had difficulty applying the doctrine to revocable trusts because the doctrine was inapplicable to a writing to be made in the future. Thus, in *Phelps v. LaMoille*,⁷⁵ the Illinois Supreme Court concluded that a will leaving the residue of an estate to a Trustee "to be delivered by said Trustee to such charities as the testator shall have designated to such Trustee . . ." failed to incorporate the purported trust document because it was not attested to with the formalities required of testamentary documents in Illinois.

To sustain the validity of the living trust, the courts resorted to the use of the doctrine of the facts of independent significance.⁷⁷ The doctrine states that a disposition is not invalid if the terms of the disposition can be ascertained from facts which have significance apart from their effect upon the disposition in the will. For example, in *Estate of Hollingsworth*,⁷⁸ a disposition of property to those employed by the testator at his death was sustained on the grounds that extrinsic evidence could be used to identify those who would take under the will. However, a disposition would be invalid where the facts from which the disposition is to be ascertained have no significance apart from making a testamentary disposition. Thus, a provision in a will directing the payment of outstanding checks was invalid.⁷⁹ The courts

⁷² *Phelps v. LaMoille* Illinois Lodge No. 27, 52 Ill. App. 2d 164, 201 N.E.2d 634 (1964); *Simon v. Grayson*, 15 Cal. 2d 531, 102 P.2d 1081 (1940).

⁷³ Thus, the mere recital of the deeds in the will was insufficient to show an intent to incorporate by reference in *Bottrell v. Spengler*, 343 Ill. 476, 175 N.E. 781 (1931).

⁷⁴ Thus in *Estate of Seiditch*, 91 Cal. App. 2d 62, 204 P.2d 364 (1949), the court held that there was nothing to show an intent to incorporate where two valid holographic documents, referring to "executors of my will" but making no disposition of property, were found in a safe deposit box clipped to a typewritten will. The will was invalid for lack of a second witness. The court stated that the testator's intent "should be reasonably apparent either from direct reference thereto in the will or from some rather unequivocal surrounding circumstances . . ." *Id.* at 66, 204 P.2d at 367.

⁷⁵ 52 Ill. App. 2d 164, 201 N.E.2d 634 (1964).

⁷⁶ *Id.* at 168, 201 N.E.2d at 636.

⁷⁷ 1 SCOTT, SCOTT ON TRUSTS §54.3 at 397 (1967).

⁷⁸ 37 Cal. App. 2d 432, 99 P.2d 599 (1940).

⁷⁹ *In re Estate of Gibbons*, 139 Misc. 568, 249 N.Y. Supp. 753 (1931),

used the facts of independent significance to uphold the validity of pour-over wills administered by an amendable trust by finding that the inter vivos trust as it exists at the testator's death was such a fact.⁸⁰

The use of these doctrines purely as a means to sustain pour-over features of a will has been somewhat supplanted by the enactment of statutes which specifically permit the use of pour-over type wills into the revocable inter vivos trust.⁸¹

REVOCATION

In every probate proceeding it is necessary to ascertain whether the document(s) offered for probate are the testator's last expression of his testamentary intent. This inquiry is vital, since a will is completely revocable at any time prior to the testator's death. As with the execution of wills, the law governing the validity of the revocation of wills depends upon whether the property disposed under the will is real or personal. As to wills disposing of personal property only, the governing law is that of testator's domicile at his death, whereas wills disposing of only real property will be governed by the law of the situs of the realty. Thus, it is possible that the valid revocation of a will as to real or personal property in one state will not be recognized in another state.⁸²

To validly revoke a will, the testator must have the same testamentary capacity as that required for execution of the will, and the testator must intend that his act constitute a revocation.⁸³ The intent to revoke must be coupled with the observance of statutorily prescribed requisites of revocation. Since these formalities are designed to prevent fraud and mistake, the statutes governing revocation must be followed exactly, and merely substantial compliance with the statute is insufficient.⁸⁴

The statutes of Arizona, California, Florida and Illinois

aff'd 234 App. Div. 153, 254 N.Y. Supp. 566 (1931). A bequest of personal property to "those persons designated in a memorandum which I shall prepare and leave in my safe deposit box" would not be valid. The memorandum has no significance apart from being a purported testamentary disposition. See 1 SCOTT, SCOTT ON TRUSTS §54.3 at 395-397 (1967).

⁸⁰ 1 SCOTT, SCOTT ON TRUSTS §54.3 at 395-397 (1967).

⁸¹ ILL. REV. STAT. ch. 3, §43a (1969). FLA. STAT. ANN. §736.17 as amended (1965). ARIZ. REV. STAT. §14-141 *et seq* (as amended 1968). CAL. PROBATE CODE §170-173 (West 1956, amended 1965).

⁸² See for example *In re Estate of Barries*, 240 Iowa 431, 35 N.W.2d 658 (1949), where a will which passed realty in Iowa was held to be revoked within the meaning of the Illinois statutes. The Iowa Supreme Court held that the denying of the purportedly revoked will to probate was not binding on the Iowa courts insofar as the disposition of the Iowa real estate was concerned.

⁸³ *Tonnellier v. Tonnellier*, 132 Fla. 194, 181 So. 150 (1938).

⁸⁴ *In re Estate of Shifflet*, 170 So. 2d 96 (Fla. App. 1965). *In re Estate of Silva*, 169 Cal. 116, 145 P. 1015 (1915).

generally provide that a will may be revoked only by 1) a subsequent written instrument executed with the same formalities as the will revoked or 2) by the burning, cancellation, obliteration or destruction of the will.⁸⁵

A subsequent valid will or codicil can wholly revoke a will if it contains a clause expressly revoking the prior will,⁸⁶ or a prior will may be revoked by a subsequent will to the extent that the provisions of the latter are inconsistent with those of the former.⁸⁷ The wills will be construed together to the extent that they are consistent. The careful draftsman will not revoke wills by implication, but instead will use a clause expressly revoking all prior wills. Testator should be warned about the problems which may be caused by failure to properly revoke a will.

Testator may revoke a will by purposely destroying his will. The act of burning, if committed on the face of the will and accompanied with the requisite intent to revoke the will, is sufficient. However, if the testator burns a paper believing it to be his will and, in fact, it is not, such act does not constitute revocation.⁸⁸ The act of tearing the will (which includes cutting)⁸⁹ can effectively revoke the will if done with the intent to revoke. If the testator scribbles on the will or in some way obliterates the writing thereon, the will is likewise revoked where such was his intent. It should be noted that additions, deletions, alterations and interlineations made in a will after its execution are ineffective to revoke the will unless made with all the formalities necessary to the valid execution of a will.⁹⁰ A will executed in duplicate is revoked if one of the wills is destroyed or mutilated by the testator.⁹¹

A presumption arises that the testator destroyed the will

⁸⁵ ARIZ. REV. STAT. §14-126 (1956). CAL. PROBATE CODE §74 (West 1956). FLA. STAT. ANN. §731.13-14 (1964). ILL. REV. STAT. ch. 3, §46 (1969).

⁸⁶ A usual express revocation clause is as follows: I (name of testator) being of sound and disposing mind and memory, do make this my last will and testament, hereby revoking and annulling all others by me heretofore made.

⁸⁷ CAL. PROBATE CODE §72 (West 1956). FLA. STAT. ANN. §731.12 (1964). ILL. REV. STAT. ch. 3, §46 (1969). Where the provisions of the latter are wholly inconsistent with the former, the former is deemed revoked and the subsequent will cannot be aided by reference to the prior will. See *In re Estate of Campbell*, 324 Ill. App. 159, 57 N.E.2d 514 (1944). *Estate of Benson*, 62 Cal. App. 2d 866, 145 P.2d 668 (1944).

⁸⁸ In *Estate of Silva*, 169 Cal. 116, 145 P. 1015 (1915), the testator burned an envelope containing a paper which he believed to be his will. Actually, the envelope contained a blank sheet of paper which had fraudulently been inserted by a beneficiary of the "revoked" will. Thus, the will was not actually destroyed. The Supreme Court held that the intent to revoke must be coupled with the act of revocation. Since the latter element was lacking, there was no revocation.

⁸⁹ *In re Estate of Callahan*, 403 Ill. 436, 86 N.E.2d 250 (1949).

⁹⁰ ILL. REV. STAT. ch. 3, §47 (1969). FLA. STAT. ANN. §731.31 (1964). ARIZ. REV. STAT. §14-126 (1956). CAL. PROBATE CODE §74 (West 1956).

⁹¹ CAL. PROBATE CODE §76 (West 1956).

with an intent to revoke where the will cannot be found after the testator's death and it is established that the will was last seen in the possession of the testator.⁹² The burden of rebutting this presumption of revocation is on the proponents of the will.⁹³

REVOCATION BY OPERATION OF LAW

Irrespective of testator's wishes, statutes may operate to revoke a will in part or in whole where there has been a change in circumstance, marital status, or domicile.⁹⁴ These statutes are designed to protect the interests of persons presumed to be entitled to testator's bounty. The statutes of Arizona⁹⁵ and California⁹⁶ provide that if testator, subsequent to the execution of the will, marries, and his wife survives him, there is a presumption that the will is revoked, unless 1) provision has been made for the spouse by a marriage contract, 2) the spouse is provided for by the will or 3) the testator expressly states that the will should not be revoked by any marriage.⁹⁷ The statutes⁹⁸ do not permit any other evidence to rebut the presumption of revocation. In Illinois,⁹⁹ and Florida, a subsequent marriage does not revoke a will.¹⁰⁰

Divorce revokes any will insofar as it affects the surviving divorced spouse in Florida and Illinois.¹⁰¹ California has reached the opposite result in a long line of cases.¹⁰²

REVIVAL OF A WILL

Revocation is a final act except where the doctrine of dependent relative revocation applies.¹⁰³ Thus, a will which is

⁹² Estate of Rodda, 152 Cal. App. 2d 300, 313 P.2d (1957); *In re Estate of Vost*, 117 So. 2d 753 (Fla. App. 1960); *In re Estate of March*, 31 Ill. App. 2d 101, 175 N.E.2d 633 (1961).

⁹³ *In re Estate of March*, 31 Ill. App. 2d 101, 175 N.E.2d 633 (1961).

⁹⁴ Since the law of the domicile at death controls as to personalty, testator may move to a state where his will is invalid. Since this comment was prepared with this situation in mind, discussion will not extend to revocation by changes in domicile.

⁹⁵ ARIZ. REV. STAT. §14-134 (1956).

⁹⁶ CAL. PROBATE CODE §70 (West 1956).

⁹⁷ A 1931 change in the California statute revised this to include only revocation as to the spouse. Arizona, which adapted its statute from California, has not made this change.

⁹⁸ ARIZ. REV. STAT. §14-134 (1956). CAL. PROBATE CODE §70(1) (West 1956).

⁹⁹ ILL. REV. STAT. ch. 3, §46 (1969).

¹⁰⁰ FLA. STAT. ANN. §731.10 (1964). However, Florida provides that the pretermitted spouse is entitled to an intestate share of testator's estate unless expressly provided to the contrary in the will. FLA. STAT. ANN. §731.101 (1964).

¹⁰¹ FLA. STAT. ANN. §731.101 (1964). ILL. REV. STAT. ch. 3, §46 (1969).

¹⁰² *In re Paterson*, 64 Cal. App. 643, 222 P. 374 (1923). This is applied even when there is a property settlement. Estate of Bartolo, 124 Cal. App. 2d 727, 269 P.2d 30 (1954).

¹⁰³ The cases have held that testator has the power to make an expressly conditional revocation. *Anderson v. Williams*, 262 Ill. 308, 104 N.E. 659

effectively revoked completely loses its testamentary character and may not and will not be revived by the revocation of the will (or codicil) which revoked the prior will.¹⁰⁴ In the states under consideration, the former will can be "revived" only by re-execution according to the statutory formalities required for its execution,¹⁰⁵ or by the execution of a codicil¹⁰⁶ or other instrument declaring its revival. Illinois permits a will partially revoked by a codicil to be revived if the codicil is revoked.¹⁰⁷ Such a will has the same effect as if there had been no revocation.¹⁰⁸

CODICILS

A codicil, a document executed with the same formalities as a will, is a testamentary instrument that amends, supplements, revokes, or republishes a prior testamentary instrument.¹⁰⁹ A valid codicil is part of the will to which it refers, and both instruments will be construed, where possible, as one.¹¹⁰ Codicils need not be attached to the wills they seek to amend, revoke or republish as long as they make clear reference to such instruments.¹¹¹ By statute, the execution of a codicil referring to a previous will has the effect of republishing the will as modified by the codicil.¹¹² The careful draftsman will restrict the use of codicils to changes in relatively simple matters such as altering amounts of legacies, changing executors or providing for a different disposition of personality. More serious changes should be enacted by the re-execution of the will.

CONCLUSION

If the draftsman of a will discovers that a prospective Illinois testator has property in Florida, California or Arizona or that the testator plans to move to any of these states, he should draft the will to anticipate any problems which might arise

(1914). *Stewart v. Johnson*, 142 Fla. 425, 194 So. 689 (1940). If the testator revokes a will with the belief that the second is valid, the law presumes an intention to revoke only if the second was valid in fact. Thus revocation is not absolute, but dependent and conditioned upon the validity of the second will. *Estate of Cuneo*, 60 Cal. 2d 196, 32 Cal. Rptr. 409, 384 P.2d 1 (1963). *In re Estate of Lubbe*, 142 So. 2d 130 (Fla. App. 1962).

¹⁰⁴ ILL. REV. STAT. ch. 3, §46 (1965). FLA. STAT. ANN. §731.15 (1964). CAL. PROBATE CODE §75 (West 1956).

¹⁰⁵ ILL. REV. STAT. ch. 3, §46 (1969). FLA. STAT. ANN. §731.18 (1964). CAL. PROBATE CODE §75 (West 1956).

¹⁰⁶ ILL. REV. STAT. ch. 3, §46 (1969). FLA. STAT. ANN. §731.17 (1964). CAL. PROBATE CODE §25 (West 1956).

¹⁰⁷ ILL. REV. STAT. ch. 3, §46 (1969).

¹⁰⁸ *Id.*

¹⁰⁹ *Estate of Benson*, 62 Cal. App. 2d 866, 145 P.2d 668 (1944).

¹¹⁰ ILL. REV. STAT. ch. 131, §1.13 (1969).

¹¹¹ The use of the doctrine of incorporation by reference is advised.

¹¹² ILL. REV. STAT. ch. 3, §46 (1969). CAL. PROBATE CODE §25 (West 1956). FLA. STAT. ANN. §731.17 (1964).

concerning execution. The draftsman should be certain that the testator is capable of the legal disposition of his property, in that he possesses testamentary capacity.

The procedures outlined above for the execution of the will should be followed as nearly as possible, since they will establish a *prima facie* showing that the will was executed in compliance with all statutory formalities and will place on any possible contestant the burden of proving lack of due execution.

The conscientious draftsman will follow the requisites for incorporation by reference. He will ascertain by direct proof that any documents to be incorporated are actually in existence. If the document incorporated refers to a revocable living trust, the draftsman should explain the consequences of alterations of such extrinsic document to the testator.

The testator should be instructed to consult the draftsman of the will (or any other skilled practitioner) if the testator chooses to alter, amend or revoke his will. If care is taken in these matters, the wishes of the testator will be carried out.

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