DRAFTING A BASIC WILL

by: Tracy Kane and Harlan Dodson

Requirements of a Tennessee Will

1. Definition of a Will. A last will and testament is a legal instrument, declarative of a person's intention, to be performed after his or her death with respect to the disposition of his or her property, the guardianship of any children, or the administration of his or her estate. T.C.A. § 32-1-101. The critical element is that to be performed after death.

2. Types of Wills. Tennessee recognizes three types of wills: attested (usually a formal typed will such as an attorney would prepare) T.C.A. § 32-1-104; holographic (where the will and signature are entirely in the handwriting of the testator) T.C.A. § 32-1-105; and nuncupative (an oral will) T.C.A. § 32-1-106. Each has separate and distinct rules to establish validity. A will must strictly meet the legal standards for that type of will. Intention alone, no matter how well proven, is not sufficient to make a will valid. There is no requirement that a will be dated, but it may be necessary to be able to determine the date to know it is the "last" will.

Requirements for an Attested Will. T.C.A. § 32-1-104. The statute provides expressly that signing by the testator may consist in:

(i) signing himself, or
(ii) acknowledging a signature already made, or
(iii) having another sign for the testator at his direction and in his presence.

Signing at the end of the will (called "subscription") is not required in Tennessee.

Tennessee law does not require that wills be notarized; instead there must be two signing witnesses who know that the instrument is a will. This is called a "publication" and it will often be inferred. Having a beneficiary serve as a witness necessary to probate does not invalidate the will; however, the witness can take no more than an intestate share, measured in value at the time of the testator's death.

The witnesses must see the testator's signature affixed or must see it at the time the testator acknowledges it. The witnesses must then sign in the presence of the testator and of one another. Relatively short distances, such as across a bank lobby, may still be in the presence of testator and each other, if the other tests are met.

An attestation clause reciting the three facts listed above is effective to create a rebuttable presumption of fact that the will was duly executed. This rebuttable presumption is sufficient to take the case to the jury even if the witnesses testify to the contrary.

Witnesses have no fiduciary duty to potential beneficiaries to assure that a will is valid. A notary's certificate will assist in probating a will in common form without the witnesses being present, but it has no impact on the validity of the will itself. A notary has no duty to give legal advice as to how to validly execute a will.

Requirements for a Holographic Will. T.C.A. § 32-1-105. A holographic will must be entirely in the handwriting of the testator and signed

by him. No witnesses to a holographic will are required, but the signature must be proved by two witnesses at the time of probate. Testamentary intent may be a question if the holograph is inartfully drawn. However, courts have stretched to find validity where the judges felt it would carry out the testator's intent.

Requirements for a Nuncupative Will. T.C.A. § 32-1-106. A nuncupative will is entirely oral. It cannot affect real property and can dispose of personal property only up to $1,000 of value ($10,000 for servicemen in time of war). A nuncupative will must be uttered by a testator in imminent peril of death who died as a result of this peril. It must also be uttered in the presence of two disinterested witnesses, one of whom reduces the will to writing within 30 days after it is uttered and offers it for probate within 6 months after the death of the testator. A nuncupative will may not revoke or alter an existing written will.

3. **Testamentary Capacity.** T.C.A. § 32-1-102. Any person of sound mind and 18 years of age or more is capable of making a will in Tennessee. "Sound mind" for this purpose means, generally, that the testator knows:

(i) The nature and effect of the act of making the will;
(ii) The nature and extent of his property;
(iii) The names and kinship of the persons who are the natural objects of his bounty.

The issue is capacity. A will written by one who is frail, but in full possession of his or her faculties, is a valid will. The soundness of mind is tested as of the time of signing the will. The existence of a conservatorship is not conclusive on soundness of mind. Fraud and undue influence may affect the validity of the will if the voluntariness of the testator's act is thereby impaired. A will is valid only if it is the testator's free and independent act.

4. **Choice of Law.** T.C.A. § 32-1-107. Under Tennessee law, a will is deemed validly executed if it is either (i) done outside Tennessee and in accordance with the law of the place of execution; (ii) done in accordance with the law of testator's domicile at the time of execution; or (iii) done in accord with Tennessee law.

5. **Revocation.** T.C.A. §§ 32-1-103, 32-1-201, and 32-1-202. The intent to revoke is essential to revocation of a will by any means. However, intention alone is not sufficient. Just as with the execution of wills, a revocation must meet the statutory requirements to be effective. A will may be revoked by a later instrument as follows:

(i) A will is revoked by a subsequent validly executed attested or holographic will containing a clause expressly revoking it specifically, or as a part of a class, such as "all prior wills and codicils."
(ii) A will is revoked by a subsequent validly executed attested or holographic will to the extent that the subsequent will is inconsistent with the former.
(iii) A will is revoked by a document of revocation executed with all of the formalities of an attested or holographic will.
(iv) If the revocation is expressly conditional upon the occurrence of another event, that condition generally will be given effect.

A will can be revoked by act, i.e., by burning, tearing, cancelling, obliterating or destroying, with the intent and for the purpose of revoking it, by the testator or by another person in the testator's presence and at his direction. For example, the court recognized as an effective revocation of part of a will where the testator took his attested will, and with a pen, subsequently enclosed some language in his will in double parentheses, underlined it, and then wrote "void" with his initials beside it. *In re Estate of Warren*, 3 S.W.3d 493 (Tenn. Ct. App. 1999).

Frequent follies in will drafting and execution

While the requirements for the contents and execution of a basic will are straightforward, essential elements frequently get omitted. Key provisions include:

1. **Declaration clause.** A declaration clause at the beginning that sets forth the testator's intent that the instrument be his or her will, states his or her residency (by county and state) and explicitly revokes any and all previous wills and/or codicils, unless the testator does not wish to do so.

2. **Deal with debts.** Be sure to direct the executor to pay the debts you want paid and only the debts you want paid. For example, properly describe whether you want a mortgage paid off or not. Remember that under the doctrine of exoneration, an heir or devisee is generally entitled to have encumbrances upon real estate paid from the estate's personal assets to the detriment of other beneficiaries, unless the will directs otherwise. This would include property passing by intestacy. This does not, however, apply to mortgages on property passing outside probate, such as by right of survivorship. Also be sure to describe how you want any debts and taxes that will be paid to

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be charged against the various bequests as it is not a good idea to rely on the Tennessee allocation statute, T.C.A. § 30-2-614.

3. **Deal with real property.** Remember that vestiture of realty in the heirs is direct and immediate, unless the will expressly provides for the personal representative to administer it, but personalty vests in the personal representative for payment of expenses, debts and taxes, after which it is distributed to the heirs. Real property is, of course, subject to expenses, etc., if personalty is insufficient.

Unless contrary to the provisions of the decedent's will, the personal representative is authorized, but not required, to pay, for a period of four months after death, the reasonable costs of routine upkeep of any real property passing under the will or by intestate succession, as an expense of administration. These expenses include items such as day to day maintenance and insurance premiums, but do not include mortgages, real property taxes, major repairs, or extraordinary expenses.

As a practical matter, practitioners often deal with the administration of real property in the will. However, in the absence of a specific provision in a will providing for the personal representative to administer the real property, under Tennessee law the real property vests upon death, and the personal representative has no right to pay upkeep expenses other than as discussed above. This is true even though the personal representative might well be looking to the real property in paying the obligations of the estate or the personal representative might have custody of the funds from which the amounts would normally be paid.

4. **Deal with other documents.** Be careful never to incorporate by reference a document that does not meet the standard for incorporation by reference. If there is an antenuptial or postnuptial agreement in effect, be sure to refer to it and clarify how the funding of it relates to any transfers under the will. Similarly, if there is any buy-sell agreement in effect, refer to it specifically and provide the handling of it.

5. **Beneficiaries and bequests.** Provide clear and correct definitions of beneficiaries, contingent beneficiaries and issue, including whether the testator intends to include adopted as well as natural born or not.

For any specific bequests, be sure to provide whether the bequest survives the death of the devisees, and if so, to whom that bequest should be distributed. Be certain that the testator understands that any specific bequests are paid first from remaining funds and that they will be paid ahead of residuary gifts to the family. Except to the extent the testator has specific desires as to personal property, it is a good idea to provide the executor with the right to distribute items of limited value as the executor deems appropriate and if any property will be left either directly, or contingently, to children, provide the executor with the right to either store it or sell it.

6. **Provide for common disaster.** It is always a good idea to include a common disaster provision (which also covers Tennessee's 120 hour rule) and always recheck it immediately before signing the will to make sure it is consistent with related wills or other estate planning documents and that the correct or intended person is surviving, whether it be the testator, the spouse or any other beneficiaries.

7. **Name responsible persons.** In choosing an executor, advise the testator to choose someone who will either do the work or find someone to do it (remember that a surviving spouse is not necessarily the best choice) and always provide who will serve in the absence of the named executor. Also, if there are minor children, don't forget to name a guardian.

8. **Attestation clause and proper signatures.** Be certain to include the attestation clause and check for proper signatures of the testator and witnesses. Be certain the witnesses are aware that they are witnessing a will and that the testator has asked that they so witness the will. Remember that while a signature on the last page is not required by Tennessee law, it is always a good idea to have the testator sign or initial each page of the document, including signing the last page. A self-proving affidavit is also helpful to establish that proper procedures were followed at execution.

One final note, always have someone else proofread the document final before signing! ■

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