



## CHAPTER 1

# Fundamental Requirements of a Will

## I. What Is a Will?

### A. Generally

**B**roadly stated, a will is the legal declaration of a person's intentions that are to be performed after his death. "A will is generally defined as an instrument by which a person makes a disposition of his property to take effect at his death, and which by its own nature is ambulatory and revocable during his lifetime." *In re Estate of Brown*, 507 S.W.2d 801, 803 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). While clearly not an advisable practice, a single document may be drafted to serve as both a will and another legal instrument. See *Calhoun v. Killian*, 888 S.W.2d 51 (Tex. App.—Tyler 1994, writ denied) (single document qualified as both will and lease); cf. *Dickerson v. Brooks*, 727 S.W.2d 652, 654 (Tex. App.—Houston [1st. Dist.] 1987, writ ref'd, n.r.e.) (single instrument qualified as promissory note and nontestamentary transfer under [Tex. Prob. Code § 450\(a\)](#); therefore, transfer at death was effective notwithstanding lack of donor's signature).

The Texas Probate Code clarifies the breadth of the term *will* as follows: "'Will' includes codicil; it also includes a testamentary instrument which merely: (1) appoints an executor or guardian; (2) directs how property may not be disposed of; or (3) revokes another will." [Tex. Prob. Code § 3\(ff\)](#).

### B. Origin of the Phrase *Last Will and Testament*

The origin of the phrase *last will and testament* is interesting. A common belief is that the term *will*, being an Old English word, was used by the king's common-law courts, which administered real property, and that the term *testament*, being of Latin origin, was used by Latin-trained ecclesiastical courts, which administered personal property. However, there is evidence that these assumptions are incorrect and that the words have been used interchangeably as far back as the English records go, even before the development of the Court of Chancery. See David Mellinkoff, *The Language of the Law* 331 (1963). Professor Mellinkoff's theory is that the phrase *last will and testament* is traceable to the English law's custom of doubling words of English origin with synonyms of French or Latin origin (free and clear, had and received, etc.).

## C. Summary of Basic Requirements

The basic requirements of a will are that—

- it must identify the testator,
- it must be written with “testamentary intent,”
- the testator must have “testamentary capacity” to execute a will (i.e., over eighteen years of age and of sound mind), and
- the will must be executed with the requisite testamentary formalities.

## II. Testamentary Intent

### A. Generally

The testamentary intent requirement is not statutory but is required under a well-developed body of case law. *See generally* 9 Gerry W. Beyer, Texas Practice Series, *Texas Law of Wills* §§ 17.1–.5 (3d ed. 2002). “The animus testandi does not depend upon the maker’s realization that he is making a will, or upon his designation of the instrument as a will, but upon his intention to create a revocable disposition of his property to take effect after his death. It is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate.” *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955).

### B. Instrument Clearly Labeled as a Will

Typically, there will be no question regarding the testamentary intent of a testator who signs an instrument that is clearly labeled as a will and is in the general form of a will. However, an instrument in the form of a will is not executed with testamentary intent when it is executed under compulsion, merely as part of a ceremony, or for purposes of deception. *See Shiels v. Shiels*, 109 S.W.2d 1112, 1115 (Tex. Civ. App.—Texarkana 1937, no writ) (instrument labeled as will denied probate when instrument was signed solely for purpose of complying with requirements to enter into lodge, but testator told witnesses that he did not want to make will and signed instrument only after being told he would be able to revoke it after the completion of initiation).

### C. Models or Instruction Letters

Numerous cases have indicated that letters directing the preparation of a will or codicil may not be probated as the person’s will. *See, e.g., Price v. Huntsman*,

430 S.W.2d 831, 833 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (“[W]ritings were not themselves intended to be her will or codicil, but were instructions or directions to her attorney to prepare a new will or codicil.”). These cases are merely a corollary to the doctrine that the writer must manifest in the writing an intent to make a testamentary disposition of property “by that particular instrument.”

#### **D. Extraneous Evidence of Testamentary Intent**

Extraneous evidence is admissible to show testamentary intent only if the instrument itself that is offered for probate contains language evidencing testamentary intent but is ambiguous on this point. *Straw v. Owens*, 746 S.W.2d 345, 346 (Tex. App.—Fort Worth 1988, no writ) (no amount of extrinsic evidence can supply absent testamentary intent to make instrument a will); *Harper v. Meyer*, 274 S.W.2d 904, 906 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.) (“But if the instrument does not possess in some degree the essential characteristics of a will . . . sufficient, at least, to give rise to the doubt, extraneous evidence cannot supply that which is otherwise totally lacking.”); *Maxey v. Queen*, 206 S.W.2d 114, 117 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) (extraneous evidence inadmissible because proposed instrument did not contain language of testamentary nature).

### **III. Testamentary Capacity—Who Can Make a Will**

#### **A. Statutory Provision**

Section 57 of the Texas Probate Code sets forth a two-part test for testamentary capacity. The first component is a status and age requirement. In order to have testamentary capacity, the individual must (1) have attained eighteen years of age, (2) be or have been lawfully married, or (3) be a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service. [Tex. Prob. Code § 57](#). Whether a particular individual satisfies this objective test is rarely an object of much controversy.

The second requirement of section 57 is that the testator be “of sound mind.” [Tex. Prob. Code § 57](#). This subjective component of the testamentary capacity test is a frequent object of controversy. Generally, the reporting cases simply reference the question of the testator’s sound mind as one of “testamentary capacity,” without mention of the status and age component.

## B. Judicial Development of the “Sound Mind” Requirement

### 1. Five-Part Test—Current Rule

In order for an individual to be of sound mind, the evidence must support a *jury finding* that the individual possesses the following characteristics:

1. Sufficient ability to understand the business in which he is engaged;
2. Sufficient ability to understand the effect of his act in making the will;
3. The capacity to know the objects of his bounty;
4. The capacity to understand the general nature and extent of his property; and
5. “[M]emory 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 relation to each other, and to be able to form a reasonable judgment as to them.” *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890).

### 2. Old Four-Part Test—No Longer the Law

Numerous earlier decisions of the courts of civil appeals have approved a short-form definition of testamentary capacity that ignores the fifth “memory requirement.” See, e.g., *Gayle v. Dixon*, 583 S.W.2d 648, 650 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.). However, the prudent practitioner should not attempt to rely on these cases.

One commentator has suggested that the fifth requirement is very important and that if the testator is not able to realize that a relationship exists between the separate elements, he “is probably not competent to make a will.” William I. Marschall, Jr., *Will Contests*, in *Texas Estate Administration* 204 (1975). Failure to use the long form will, at the very least, present an argument for appeal. See *Gayle*, 583 S.W.2d 648; 9 Gerry W. Beyer, *Texas Practice Series, Texas Law of Wills* § 16.2 (3d ed. 2002) (“[T]he safer case would seem to be to use the long form, where it is requested by either party at the trial, or where either party objects to omission of the final element.”).

Other cases consistently use the long form. See *Tieken v. Midwestern State University*, 912 S.W.2d 878, 882 (Tex. App.—Fort Worth 1995, no writ); *Oechsner v. Ameritrust Texas, N.A.*, 840 S.W.2d 131, 134 (Tex. App.—El Paso 1992, writ denied); *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.—Dallas 1992, no writ); *Broach v. Bradley*, 800 S.W.2d 677, 680–81 (Tex. App.—Eastland 1990, writ denied); *Campbell v. Groves*, 774 S.W.2d 717, 718 (Tex. App.—El Paso 1989, writ denied); *Alldridge v. Spell*, 774 S.W.2d 707, 709–10 (Tex. App.—Texarkana 1989, no writ); but see *Hoffman v. Texas Commerce Bank*, 846 S.W.2d 336, 340 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (short-form definition of testamentary capacity used).

### 3. *Lucid Intervals*

Testamentary capacity on the day the will was executed is all that is required. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983) (medical evidence of incompetency could be considered regarding lack of capacity when the evidence was probative of testator's lack of testamentary capacity on date of execution of will). However, evidence of incapacity at other times is generally relevant. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968) (evidence of incompetency at other times is admissible only if it demonstrates that condition persists and has some probability of being same condition that existed at time of will's making); *Lowery v. Saunders*, 666 S.W.2d 226, 236 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.—Dallas 1992, no writ). *Accord Hammer v. Powers*, 819 S.W.2d 669, 672 (Tex. App.—Fort Worth 1991, no writ) (evidence was sufficient to show witnesses' personal knowledge of testamentary capacity when witnesses observed testator on day will was executed but not at any other time; summary judgment admitting will to probate upheld); cf. *Alldrige v. Spell*, 774 S.W.2d 707, 710 (Tex. App.—Texarkana 1989, no writ) (evidence of incapacity at other times supported jury finding of lack of testamentary capacity notwithstanding direct evidence of capacity on day will was executed).

In *In re Neville*, 67 S.W.3d 522 (Tex. App.—Texarkana 2002, no pet.), the proponents of the will, citing *Lee*, asserted that evidence of incapacity at other times may be considered only when there is no direct evidence of the testator's testamentary capacity on the date the will is actually signed. Rejecting this analysis, the court stated as follows:

It has always been the rule in Texas that, although the proper inquiry is whether the testator had testamentary capacity at the time he executed the will, the court may *also* look to the testator's state of mind at other times if those times tend to show his state of mind on the day the will was executed. Evidence pertaining to those other times, however, must show that the testator's condition persisted and probably was the same as that which existed at the time the will was signed. Whether the evidence of testamentary capacity is at the very time the will was executed or at other times goes to the weight of the testimony to be assessed by the fact finder.

*In re Neville*, 67 S.W.3d at 525.

### 4. *Lay Opinion Testimony Admissible*

Lay opinion testimony of witnesses' observations of the testator's conduct, either before or after the execution of the will, is admissible to show incompetency. *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.—Dallas 1992, no writ) (citing *Campbell v. Groves*, 774 S.W.2d 717, 719 (Tex. App.—El Paso 1989, writ denied)).

## **5. Prior Adjudication of Insanity: Presumption of Continued Insanity**

A prior adjudication of insanity generally raises a presumption of continued insanity until the status of that person has been changed by a subsequent judgment of the county court in a proceeding authorized for that purpose. *Bogel v. White*, 168 S.W.2d 309, 311 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.). A prior adjudication of insanity is admissible but not conclusive, and the presumption of continuing insanity may be rebutted. Further, a prior adjudication of mental illness is also admissible but not conclusive. See *Haile v. Holtzclaw*, 414 S.W.2d 916, 925–26 (Tex. 1967). In *Haile*, fifteen days before the date he executed his will, the testator was determined to be mentally ill. He was committed to a mental hospital, and the court appointed a temporary guardian for him. Nevertheless, the testator was found to have testamentary capacity. *Haile* was decided under former Texas Revised Civil Statutes article 5547–83 (repealed by Acts 1991, 72d Leg., R.S., ch. 76, § 19 (H.B. 902), eff. Sept. 1, 1991), the predecessor to [Tex. Health & Safety Code § 576.002](#). Section 576.002, unlike the statute applicable in *Haile*, specifically provides that the provision of mental health services does not limit the patient's mental capacity. The revised statutory language does not seem to alter the rule of admissibility.

## **6. Subsequent Adjudication of Insanity: Not Admissible**

According to the Texas Supreme Court, an adjudication of insanity subsequent to the time of the execution of a will is not admissible. See *Carr v. Radkey*, 393 S.W.2d 806, 815–16 (Tex. 1965) (appointment of guardian twenty-one days subsequent to execution of will inadmissible); *but see Stephens v. Coleman*, 533 S.W.2d 444 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). In *Stephens*, the trial court admitted evidence that, three days after the date of signing his will, the testator was adjudged incompetent to handle his affairs. The appellate court did not discuss whether this evidence was properly admissible but simply noted that this subsequent adjudication did not raise a presumption of incapacity on the date the will was signed. The court upheld the trial court's finding that the testator had testamentary capacity. See also 9 Gerry W. Beyer, Texas Practice Series, *Texas Law of Wills* § 16.5 (3d ed. 2002).

## **7. Comparison of Testamentary Capacity with Contractual Capacity**

### **a. Contractual Capacity in General**

Section 39, Contracts, in Texas Jurisprudence, provides a concise summary of contractual capacity:

“Mental capacity” may be defined as the ability of a person to understand the nature and effect of the acts in which he or she is engaged and the business that he or she is transacting. One of the tests of the right to rescind or avoid a contract is whether the contracting party, at the time of making the agreement, possessed sufficient mental capacity to know and understand the nature and consequences of his or her act in entering into the contract. However, mere mental weakness is not in itself sufficient to incapacitate a person; and mere nervous tension, anxiety, or personal problems do not amount to mental incapacity to enter into contracts. Moreover, the fact that one has a firm belief in spiritualism is not sufficient to incapacitate a person, especially where such belief is founded on reading and other evidence deemed by the person to be sufficient. On the contrary, the disposition of property and the conduct of business affairs will be upheld where a grantor, though old and infirm physically and mentally, nevertheless responds to tests that are applicable generally to people in the ordinary experiences of life. Indeed, it is presumed by law that every party to a valid contract had sufficient mental capacity to understand his or her legal rights with respect to the transaction. The burden of proof with regard to overcoming this presumption rests on the person who asserts the contrary.

Where the evidence presented is sufficient to raise an issue as to the mental capacity of a party to enter into a contract, the question whether the party possessed the requisite capacity is one of fact for the jury. However, the quantum of intelligence or mental capacity to make a valid contract is a question of law.

14 Tex. Jur. 3d *Contracts* § 39 (1981).

### **b. Testamentary and Contractual Capacity Compared**

Less mental capacity is required for making a will than for entering into a contract. *Vance v. Upson*, 1 S.W. 179 (Tex. 1886); *Hamill v. Brashear*, 513 S.W.2d 602, 607 (Tex. Civ. App.—Amarillo 1974, writ ref’d n.r.e.). This statement of the general wisdom is certainly accurate, but it seems an oversimplification of the rule inasmuch as it implies that contractual capacity and testamentary capacity are substantively different.

A review and comparison of the respective authorities supports the view that the difference between contractual capacity and testamentary capacity is purely quantitative, not qualitative. Fundamentally, both tests look to the capacity of the individual to appreciate what he is doing and to understand the nature and effect of what he is doing. It is because of the differing nature and effect of contracts and wills that the requisites of this singular concept are different in the two circumstances.

Because a will has no legal effect until death and remains revocable during life, its execution cannot have any effect on the testator’s own circumstances. The testator, therefore, need not have the capacity to understand the effect that signing a will has on

his own circumstances (as there is no effect) in order to have the capacity to understand the effect of his act of making a will. On the other hand, the testator does need the capacity to know the objects of his bounty and the nature and extent of his property if he is to appreciate the nature and consequence of his making a disposition of his property at his death.

## **8. Insane Delusion**

### **a. General Rule**

Even though the general requirements of testamentary capacity described above are satisfied, a will or an affected portion of a will may be held invalid on the basis of an “insane delusion” if the testator was laboring under “the belief of a state of supposed facts that do not exist, and which no rational person would believe.” *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964) (quoting *Knight v. Edwards*, 264 S.W.2d 692, 695 (Tex. 1954)). There is some authority that the second requirement may be satisfied only by showing that an organic brain defect or a functional disorder of the mind existed. See *Spillman v. Estate of Spillman*, 587 S.W.2d 170, 173 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.). Cf. *Oechsner v. Ameritrust Texas, N.A.*, 840 S.W.2d 131, 134 (Tex. App.—El Paso 1992, writ denied) (court embraced Texas’s 100-year-old, two-pronged definition of insane delusion, declining to adopt more detailed definition from other jurisdictions incorporating reference to, *inter alia*, organic brain defect and function disorder of the mind).

### **b. Examples**

Examples of insane delusions are described by the court in *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964):

Examples of such false beliefs are cases where the “testator believed, in spite of the fact that all the evidence was to the contrary, that his son had been to the planet Mars and had conspired against the United States and should therefore be disinherited; or that his wife was plotting to kill him; or that his daughter had murdered his father; or that he was hated by his brothers and sisters who were bent on persecuting him.”

### **c. Delusion Must Have No Basis in Fact**

“A mere mistaken belief or an erroneous or unjust conclusion is not an insane delusion if there is some foundation in fact or some basis on which the mental operation of the testator may rest, even though the basis may be regarded by others as wholly insufficient.” *Navarro v. Rodriguez*, 235 S.W.2d 665, 668 (Tex. Civ. App.—San Antonio 1950, no writ) (quoting from 68 C.J. 433, Wills, § 30 (1922)). The

practitioner hoping to defeat a will on grounds of insane delusion should specifically rebut any express or implicit facts or circumstances that might constitute a basis for the testator's belief. See *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.—San Antonio 1996, writ denied) (testator believed that individual was her son; jury found that testator's belief was mistaken but also found that testator had testamentary capacity; held: because record contained no evidence that testator was not pregnant and did not give birth on the date of individual's birth, two jury findings were consistent).

#### **d. Delusion Must Affect Will Provisions**

The clearly deluded client does not necessarily lack testamentary capacity. Rather, the delusion must affect the provisions in the will in order for the will to be invalidated based on insane delusion. *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 411–12 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). The mere appearance of a delusion does not in and of itself prohibit a finding of testamentary capacity. *Campbell v. Groves*, 774 S.W.2d 717, 719 (Tex. App.—El Paso 1989, writ denied) (“A person could appear bizarre or absurd with reference to some matters and still possess the assimilated and rational capacities to know the objects of his bounty, the nature of the transaction in which he was engaged and nature and extent of his estate on a given date.”).

## **IV. Execution Requirements**

### **A. Summary**

#### **1. Statutory Provision**

Section 59 of the Texas Probate Code contains three general execution requirements for wills: (1) the will must be signed by the testator or by another person at his direction and in his presence, (2) the will must be attested by two or more credible witnesses over fourteen years of age, and (3) the witnesses must sign in the presence of the testator. See *Tex. Prob. Code § 59(a)*. The latter two items are not required for holographic wills (i.e., entirely in the testator's handwriting; see section IV.F in this chapter).

#### **2. Self-Proved Requirements Need Not Be Satisfied**

Section 59 also provides that a will may be made self-proved and sets forth the requirements for a valid self-proving affidavit. See *Tex. Prob. Code § 59(a), (b)*. However, a will need not be executed with the additional requirements for a self-proving affidavit to be valid. “The only purpose of the form and contents of the Section 59 self-proving affidavit is to admit a will to probate without, and as an alternative to

resorting to, the testimony of a subscribing witness.” *Broach v. Bradley*, 800 S.W.2d 677, 680 (Tex. App.—Eastland 1990, writ denied) (citing *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966)). See also *Fox v. Amarillo National Bank*, 552 S.W.2d 547 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.); *Cutler v. Ament*, 726 S.W.2d 605 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d, n.r.e.).

If a will is self-proved, the proponent has prima facie established that the will was executed with the requisite testamentary formalities. *Bracewell v. Bracewell*, 20 S.W.3d 14, 26 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In the absence of evidence or argument to rebut the prima facie showing, no further proof of the execution is necessary. *Bracewell*, 20 S.W.3d at 26.

### **3. Substantial Compliance**

Under the Uniform Probate Code and the Restatement (Third) of Property, substantial compliance with the applicable formal execution requirements is sufficient. UPC § 2-503 (1990); Restatement (Third) of Property (Wills and Other Donative Transfers) § 3.3 (1998). See also *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991) (New Jersey Supreme Court applying substantial compliance test to alleged defective attestation of will). Texas cases have not adopted a substantial compliance exception to the specific statutory requirements of section 59 of Texas Probate Code. “Nowhere in this section, or any other, is there any mention of ‘substantial compliance’ with the attesting signature requirements of the will itself contained in Section 59(a).” *In re Estate of Iverson*, 150 S.W.3d 824, 826 (Tex. App.—Fort Worth 2004, no pet.). However, effective September 1, 1991, section 59 was amended to solve the *Boren* problem (see section IV.B.8 in this chapter) and to permit forms of self-proving affidavits that substantially comply with the statutory form (see section X in chapter 11 of this book).

### **4. Reading of Will Not Required**

Whether the testator read the will before signing it is not an issue relating to the satisfaction of the execution requirements of section 59. *In re Estate of Browne*, 140 S.W.3d 436, 439 (Tex. App.—Beaumont 2004, no pet.). However, the prudent practitioner will make certain that the testator has read the will and understands the contents of the will.

## **B. Signed by Testator**

### **1. Handwriting Not Necessarily Required**

The testator’s signature need not be in his own handwriting. *Phillips v. Najjar*, 901 S.W.2d 561, 562 (Tex. App.—El Paso 1995, no writ) (signature by rubber stamp

sufficient); *Zaruba v. Schumaker*, 178 S.W.2d 542, 543 (Tex. Civ. App.—Galveston 1944, no writ) (typewritten signature on attested will satisfies signature requirement).

## **2. Initials by Testator**

“A signature by initials is sufficient to execute the instrument as a will . . . .” *Trim v. Daniels*, 862 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citations omitted).

## **3. Mark by Testator**

A number of Texas cases have recognized the validity of a testator’s “mark” as a valid signature. *See, e.g., Orozco v. Orozco*, 917 S.W.2d 70, 73 (Tex. App.—San Antonio 1996, writ denied); *Phillips v. Najjar*, 901 S.W.2d 561, 562 (Tex. App.—El Paso 1995, no writ); *Guest v. Guest*, 235 S.W.2d 710, 713 (Tex. Civ. App.—Fort Worth 1951, writ ref’d n.r.e.).

## **4. Signature Written by Another Person**

The testator’s signature may be written by another person at the testator’s direction and in testator’s presence. The testator’s direction may be indicated by express words, an affirmative response to a question, or by mere gestures. *See* 9 Gerry W. Beyer, Texas Practice Series, *Texas Law of Wills* § 18.6 (3d ed. 2002). However, if the testator does not specifically indicate in some manner that someone should sign for him, the will cannot be probated. *See, e.g., Muhlbauer v. Muhlbauer*, 686 S.W.2d 366, 376–77 (Tex. App.—Fort Worth 1985, no writ) (wife guided husband’s hand as he signed will, but witnesses to execution could not remember whether testator specifically asked his wife to help him; court denied probate of will, observing that mere acquiescence in help from wife does not satisfy “at his direction” requirement in section 59 of the Probate Code).

Section 406.0165 of the Texas Government Code provides an additional method for signing a document. A notary may sign for an individual who is physically unable to sign or make a mark on the document presented for notarization if directed by the individual to sign his name. The notary must sign the individual’s name in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed. The notary must require identification from the witness just as if the witness was the person making the acknowledgment, and the notary must write beneath his signature the following or substantially similar to the following: “Signature affixed by notary in the presence of (name of witness), a disinterested witness, under Section 406.0165, Government Code.” *Tex. Gov’t Code* § 406.0165(a), (b).

## **5. Forged Signature**

Obviously, a purported will containing a forgery of the testator's signature cannot be probated. *See Aston v. Lyons*, 577 S.W.2d 516, 519 (Tex. Civ. App.—Texarkana 1979, no writ).

## **6. Mark by Testator Combined with Signature by Another Person**

In many of the Texas cases where another person signed for the testator, the testator also made his mark on the will. *See, e.g., Phillips v. Najjar*, 901 S.W.2d 561 (Tex. App.—El Paso 1995, no writ) (use of rubber stamp by third person to affix testator's signature, in accordance with her instructions, did not render her will invalid; stamp complied with procedure allowing testator to instruct another person to sign her name by the other person's hand, and in any event, handwritten mark by testator near stamp was valid substitute for signature); *Davenport v. Minshew*, 104 S.W.2d 951 (Tex. Civ. App.—San Antonio 1937, writ ref'd).

## **7. Signature in Body of Will**

There is no requirement that the will be signed “at the foot or end thereof” (as required by the English Wills Act of 1837 and by various American jurisdictions). The historic landmark English case of *Lamayne v. Stanley*, decided only four years after the enactment of the original statute of frauds, has been cited in several Texas cases recognizing the validity of a signature in the body of a will. However, the only Texas cases applying the doctrine involve unattested holographic wills. *Burton v. Bell*, 380 S.W.2d 561, 568 (Tex. 1964) (dictum); *In re Estate of Brown*, 507 S.W.2d 801 (Tex. Civ. App.—Dallas 1974, no writ); *Lawson v. Dawson's Estate*, 21 Tex. Civ. App. 361, 53 S.W. 64 (Dallas 1899, writ ref'd).

## **8. Signing Only Self-Proving Affidavit**

The self-proving affidavit is not a part of the will, and under prior law, if the testator failed to sign the will, his signature on the self-proving affidavit was not sufficient, and the will would not be admitted to probate. *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

Effective September 1, 1991, Probate Code section 59 provides that “[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered self-proved.” *Tex. Prob. Code § 59(b)*. Thus, if the testator signs only the self-proving affidavit, the will can still be admitted to

probate, but the conditions of Probate Code sections 84(b) and 88(b) must be satisfied as if the will were not self-proved. Even if the will at issue was executed prior to September 1, 1993, this “anti-*Boren*” amendment to section 59 will be applicable if the date of death is after September 1, 1993. *Bank One, Texas v. Ikard*, 885 S.W.2d 183, 186 (Tex. App.—Austin 1994, writ denied).

## **C. Attested and Subscribed by Two Credible Witnesses**

### **1. Attestation**

Section 59 of the Probate Code requires that the will “be attested by two or more credible witnesses . . . who shall subscribe their names thereto.” [Tex. Prob. Code § 59\(a\)](#). This language clearly indicates that the witnesses must both “attest” and “subscribe” (or sign) the will. The attestation requirement has been described as follows: “Attestation of a will consists in the act of witnessing the performance of the statutory requirements to a valid execution. This is done by the witnesses signing their names to the instrument in the presence of the testator.” *Davis v. Davis*, 45 S.W.2d 240, 241 (Tex. Civ. App.—Beaumont 1931, no writ).

Typically, an attestation clause is inserted directly preceding the witnesses’ signatures reciting that the statutory execution requirements have been satisfied, but no such attestation clause is required.

### **2. Order of Signing**

If the witnesses must attest performance of the statutory requirements to a valid execution, is it necessary that the testator sign the will in their presence before they sign the will? Texas cases clearly indicate that the will need not be signed by the testator in the presence of the attesting witnesses. *See In re Estate of McGrew*, 906 S.W.2d 53 (Tex. App.—Tyler 1995, writ denied) (testator need not sign will in presence of witnesses, and thus, fact that testator executed challenged will two years before witness signed will did not render will invalid); *Venner v. Layton*, 244 S.W.2d 852 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.). Furthermore, several Texas cases have suggested that a will might be valid even if signed by the testator out of the witnesses’ presence after the witnesses had signed. *See Ludwick v. Fowler*, 193 S.W.2d 692, 695 (Tex. Civ. App.—Dallas 1946, writ ref’d n.r.e.); *Guest v. Guest*, 235 S.W.2d 710, 713 (Tex. Civ. App.—Fort Worth 1951, writ ref’d n.r.e.). However, the general rule in American jurisdictions requires that the testator sign before the attesting witnesses subscribe their names, and the careful estate planner or practitioner should not place too much reliance on the two cited Texas cases.

### 3. Number of Witnesses

#### a. Texas Statutory Requirement

Probate Code section 59 requires “two or more credible witnesses above the age of fourteen years.” [Tex. Prob. Code § 59\(a\)](#). While the will may be “proved” for probate by the testimony of any one of the attesting witnesses (*see* [Tex. Prob. Code § 84\(b\)\(1\)](#)), two competent witnesses are required to have a valid will. Interestingly, at least one Texas case has recognized the notary’s signature as constituting a witness’s signature. *Reagan v. Bailey*, [626 S.W.2d 141](#) (Tex. App.—Fort Worth 1981, writ ref’d n.r.e.) (notary signed and notarized acknowledgment following testator’s signature line, and one other witness signed; codicil was admitted to probate); *see also In re Estate of Teal*, [135 S.W.3d 87](#) (Tex. App.—Corpus Christi 2002, no pet.) (notary public served as subscribing witness, although she intended to sign only as notary).

#### b. Signature by More Than Two Witnesses

Texas attorneys differ in their practice as to whether two or three witnesses are used in execution ceremonies. Several states require there to be three witnesses for a will to be valid. However, all of the states requiring three witnesses have statutory provisions validating wills executed in accordance with the statutes of the state of execution. Thomas E. Atkinson, *Law of Wills* 308, 350 (2d ed. 1953). Although the testator may move to another state or own land in another state before his death, some writers question the advisability of using more than two witnesses because the statutes of some states require that all attesting witnesses testify on probate or be accounted for. Atkinson, at 351.

### 4. Credibility of Witnesses; Interested Witnesses

As noted above, section 59 of the Probate Code requires that the will “be attested by two or more *credible* witnesses.” [Tex. Prob. Code § 59\(a\)](#) (emphasis added).

#### a. Meaning of Credible

For purposes of section 59, “the word ‘credible’ . . . does not mean ‘worthy of belief’, but rather, ‘competent’ or ‘able to tell about the attestation.’” *Lehmann v. Krahl*, [285 S.W.2d 179](#), 180 (Tex. 1955); *see also Triestman v. Kilgore*, [838 S.W.2d 547](#) (Tex. 1992) (for purposes of section 59, *credible* and *competent* are synonymous). Thus, as a threshold, every witness to the will must have sufficient mental capacity to be able to observe and testify as to the proper execution of the will. *See* 9 Gerry W. Beyer, Texas Practice Series, *Texas Law of Wills* § 18.14 (3d ed. 2002).

### **b. Executor as Subscribing Witness**

A person named as an executor in a will may nevertheless be a competent attesting witness. *Connor v. Purcell*, 360 S.W.2d 438, 439–40 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.). However, most careful planners avoid using a named executor as a witness.

### **c. Beneficiary as Subscribing Witness**

Under Texas law, the fact that an individual who is a beneficiary also signs the will as a witness does not in and of itself render the will invalid. *Scandurro v. Beto*, 234 S.W.2d 695, 697 (Tex. Civ. App.—Waco 1950, no writ) (“Nor is a will void because attested by one to whom a bequest is made.”), *cited with approval in Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992). However, prior to the effective date of the 1955 Texas Probate Code, “[a] will [was] still invalid unless attested by two disinterested witnesses who take nothing under it.” *Scandurro*, 234 S.W.2d at 697.

### **d. Interested Witness Statute**

Section 61 of the Probate Code provides that if a will contains a bequest to an individual who is also a witness, “if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made.” *Tex. Prob. Code § 61*. This statute appears grounded in the public policy “to uphold the rights of a testator to make such dispositions and prevent their failing because of the incompetence of the witnesses.” *Scandurro v. Beto*, 234 S.W.2d 695, 697 (Tex. Civ. App.—Waco 1950, no writ).

Note, however, that the forfeiture is not absolute. If the witness would have been entitled to an intestate share of the estate, he is entitled to so much of the intestate share as will not exceed the value of the bequest made to him in the will. *Tex. Prob. Code § 61*.

### **e. Corroboration of Testimony of Interested Witness—Old Law**

Under former Texas Revised Civil Statutes article 4873 (eff. Sept. 1, 1879), the predecessor to section 62 of the Texas Probate Code, a will could be proved by the testimony of the subscribing witnesses, even if a subscribing witness was also a beneficiary, provided that the witnesses’ testimony was “corroborated by the testimony of one or more *other* disinterested and credible persons . . . in which event the bequest to such subscribing witness [would] not be void” (emphasis added). Act approved Mar. 15, 1875, 14th Leg., 2d R.S., ch. 121, § 1, 1875 Tex. Gen. Laws 179, *reprinted in* 6 H.P.N. Gammel’s *The Laws of Texas 1822–1897*, at 551 (Austin,

Gammel Book Co. 1898), *amended by Act of Mar. 17, 1955, 54th Leg., R.S., ch. 55, 1955 Tex. Gen. Laws 88.*

This language was interpreted by the courts as requiring that the testimony of the beneficiary-witness be corroborated by someone other than the other disinterested witness. *Fowler v. Stagner*, 55 Tex. 393 (1881) (gift to one of only two attesting witnesses voided under predecessor to Probate Code § 61); *Scandurro v. Beto*, 234 S.W.2d 695, 697 (Tex. Civ. App.—Waco 1950, no writ) (*Fowler* followed on almost identical facts); *see also* 9 Gerry W. Beyer, Texas Practice Series, *Texas Law of Wills* §§ 18.31–.37 (3d ed. 2002) (detailing the historical development of the interested witness rule in Texas).

#### **f. Corroboration of Testimony of Interested Witness—Current Law**

Since 1955 the Probate Code has simply required that the testimony of a beneficiary-witness be corroborated “by one or more disinterested and credible persons who testify that the testimony of the subscribing [beneficiary-witness] is true and correct, and such [beneficiary-witness] shall not be regarded as an incompetent or noncredible witness under Section 59 of this Code.” *Tex. Prob. Code* § 62.

By eliminating the qualifying adjective “other,” at least one commentator has concluded that “the Code leaves no ground for the inference that the testimony of both attesting witnesses, corroborated by some person other than an attesting witness, would be required to save the gift to an attesting witness.” 9 Gerry W. Beyer, Texas Practice Series, *Texas Law of Wills* § 18.37 (3d ed. 2002). This conclusion is consistent with the Interpretive Commentary to section 62, reproduced in *Wilkerson v. Slaughter*, 390 S.W.2d 372, 373 (Tex. Civ. App.—Texarkana 1965, writ *dism’d*), which states, *inter alia*, that “the last clause in this Section is intended to repudiate the holding in [*Scandurro* that the testimony of the disinterested witness was not sufficient corroboration of the testimony of the beneficiary-witness] and to incorporate into the code the contrary holding in *Ridgeway v. Keene*, 225 S.W.2d 647 (Tex. Civ. App.—Dallas 1949, writ *ref’d, n.r.e.*)”

Nevertheless, the prudent practitioner will continue to avoid beneficiary-witnesses at all costs. Section 62 of the Texas Probate Code does not prohibit corroboration by an attesting witness, but neither does it specifically authorize it. Further, no Texas case has been found that holds that the testimony of a disinterested attesting witness is sufficient corroboration of the beneficiary-witness’s testimony. Rather, both of the relevant cases found used the testimony of an individual other than an attesting disinterested witness to corroborate the testimony of the beneficiary-witness. In *Ridgeway*, 225 S.W.2d at 648–49, there were three subscribing witnesses, one disinterested and two interested; however, there was a fourth individual present at the signing who was able to corroborate. In *Wilkerson*, 390 S.W.2d at 373, there were again three witnesses, one disinterested and two interested; however, the notary who took the affidavits and acknowledgments was able to corroborate.

The risk is increased further by the Texas Supreme Court's holding in *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992). In that case, the court denied the writ of error, thus upholding the appellate court decision denying probate. However, in its per curiam decision, the court stated flatly: "A competent witness to a will is one who receives no pecuniary benefit under its terms. Conversely, a person interested as taking under a will is incompetent to testify to establish it." *Triestman*, 838 S.W.2d at 547 (citations omitted). As support for its second statement, the Supreme Court cited to, *inter alia*, *Fowler v. Stagner*, 55 Tex. 393 (1881), which was presumably repudiated, along with *Scandurro v. Beto*, 234 S.W.2d 695, 697 (Tex. Civ. App.—Waco 1950, no writ), by the 1955 Probate Code's new section 62, which eliminated the "other" modifier and specifically provided that, if corroborated, a beneficiary-witness is a competent witness under section 59.

### **g. Proof of Witness's Credibility**

The appellate court decision in *Triestman* focused on the credibility requirement and set aside the probate of a non-self-proved will in which, *inter alia*, there had been no evidence presented to the probate court concerning the "credibility and competence" of the attesting witnesses. *In re Estate of Hutchins*, 829 S.W.2d 295 (Tex. App.—Corpus Christi 1992), writ denied sub nom. *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992). The proponent of the will had also failed to introduce evidence that the testator was of sound mind on the date that the will was executed. Noting that the facts set out in the attestation clause are admissible as evidence, the court determined that there was evidence that the witnesses were each over the age of fourteen years, that they signed at the request of the testator, in his presence and in the presence of each other, and that the testator signed in the presence of the witnesses. Implicitly, then, a prima facie case that the witnesses are credible should be made by including a statement to that effect in the attestation clause.

Even though the appellate decision stood, the Supreme Court expressly disapproved of the appellate court's analysis as to credibility (instead stating that the witnesses were credible simply by virtue of being disinterested). However, the Supreme Court noted that "the will itself constitutes some evidence that the witnesses were credible." *Triestman*, 838 S.W.2d at 547. Thus, it seems safe to rely on this aspect of the appellate court's decision.

## **5. Place for Witnesses' Signatures**

The witnesses' signatures need not necessarily appear on the same page as the testator's signature. *Tucker v. Hill*, 577 S.W.2d 321, 322–23 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). There is no particular place on the will that the witness must sign, as long as the witness signed the will at some place with intent to attest the will.

## 6. Signing Only Self-Proving Affidavit

The self-proving affidavit is not a part of the will. Under prior law, if a necessary witness signed only the self-proving affidavit, he had not signed the will and the will would not be admitted to probate. *Wich v. Fleming*, 652 S.W.2d 353, 354 (Tex. 1983) (testator signed at end of will but witnesses only signed self-proving affidavit; will denied probate); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

Effective September 1, 1991, Probate Code section 59 provides that “[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered self-proved.” *Tex. Prob. Code § 59(b)*. Thus, if a witness signs only the self-proving affidavit, the will can still be admitted to probate but the conditions of Probate Code sections 84(b) and 88(b) must be satisfied as if the will were not self-proved.

### D. Witnesses Sign in Presence of Testator

Texas cases have applied a “conscious presence” test: “[T]o be within the testator’s 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.” *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref’d n.r.e.).

In one case, the court found that the witness was not in the presence of the testator where the testator signed in a conference room and the witnesses signed in a secretary’s office separated by two solid walls from the conference room. The testator could have seen the witnesses sign only by “arising from his chair, walking some four feet to the hallway and then walking about fourteen feet down the hallway to a point where he could have looked through the doorway and seen the witnesses as they signed their names.” *Morris v. Estate of West*, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref’d n.r.e.).

### E. Interlineations

#### 1. General Rule

Alterations or interlineations made on the original will before to its execution are controlling. *Schoenhals v. Schoenhals*, 366 S.W.2d 594, 599 (Tex. Civ. App.—Amarillo 1963, writ ref’d n.r.e.); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. Civ. App.—Austin 1952, writ dism’d); see *Douglas v. Winkle*, 623 S.W.2d 764 (Tex. App.—Texarkana 1981, no writ). However, alterations to the will made after the original

execution are not controlling, and the will stands as originally written. *Leatherwood v. Stephens*, 24 S.W.2d 819, 823 (Tex. Comm'n App. 1930, holding approved).

## 2. Excessive Revisions May Cause Will to Fail

If alterations have been made such that the proponent of a will cannot establish the terms of the will at the time it was executed, the will may be denied probate. *Mahan v. Dovers*, 730 S.W.2d 467 (Tex. App.—Fort Worth 1987, no writ) (decedent had habit of changing will by pulling out pages and having them retyped and reinserted; noting that various pages of will had different number of staple holes with greatest number being in signature page, court held proponent of will did not meet his burden to prove that will offered for probate was the same as the one formally executed by decedent). *But see In re Estate of McGrew*, 906 S.W.2d 53 (Tex. App.—Tyler 1995, writ denied) (marks on will made by testator's relative, who borrowed will as form to use for her own, did not render will invalid); *In re Estate of Montgomery*, 881 S.W.2d 750 (Tex. App.—Tyler 1994, writ denied) (certain provisions of will had been heavily obliterated by testator subsequent to proper execution; will challenged on grounds, *inter alia*, that will offered was not the same as will as properly executed; will admitted to probate when contestant failed to submit to jury the question of validity of attempt to eliminate obliterated passage).

## 3. Interlineations during Execution

It follows that if there are any minor revisions or other interlineations made in a will immediately before its execution, the ability to prove that they were made before the will is executed becomes critical. The general rule in other jurisdictions is that a presumption arises that any alterations or interlineations were made after the execution of the will, and the burden of proof is on the proponent of the will to prove otherwise. *See* W.W. Allen, Annotation, *Interlineations and Changes Appearing on Face of Will*, 34 A.L.R.2d 619, § 7 (1954); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. Civ. App.—Austin 1952, writ dismissed) (dictum). Indeed, an interlineation into a will drawn in a formal manner by an attorney is particularly suspicious, and the presumption might be particularly applicable in that circumstance. *Freeman*, 252 S.W.2d at 765. Accordingly, if minor revisions or interlineations are made in a will at the execution ceremony, the testator and all witnesses should date and sign or initial the margin of the will beside the interlineation to assist in overcoming the presumption.

## 4. Holographic Wills

For holographic wills, an alteration made after the will is signed is treated as a valid revocation of the prior provisions and valid disposition pursuant to the new provisions, with the prior signature being adopted. *Hancock v. Krause*, 757 S.W.2d 117, 120–21 (Tex.

App.—Houston [1st Dist.] 1988, no writ) (subsequent substitution of different beneficiary for specific bequest was effective even though subsequent change was not signed).

## **F. Holographic Will**

### **1. General Requirements—In Testator’s Handwriting and Signed by Him**

#### **a. Statutory Provision**

Section 59 of the Texas Probate Code states that a will is valid if it is (1) “signed by the testator in person or by another person for him by his direction and in his presence” and (2) “wholly in the handwriting of the testator.” [Tex. Prob. Code § 59\(a\)](#). In a case where a holographic codicil was not signed and an identical typewritten instrument was signed by the testator but not witnessed, the court refused probate of the codicil, holding that the two instruments could not be construed together. *See In re Estate of Jansa*, [670 S.W.2d 767](#) (Tex. App.—Amarillo 1984, no writ).

#### **b. Signature Requirement**

The law regarding the requirement of the testator’s signature on an attested will applies equally to holographic wills, including the rule that the signature need not necessarily appear at the end of the will. See section IV.B.7 in this chapter. “However, while the signature may be informal and its location is of secondary importance, it is still necessary that the maker intend that his name or mark constitute a signature, i.e., that it expresses approval of the instrument as his will.” *Luker v. Youngmeyer*, [36 S.W.3d 628](#), 630 (Tex. App.—Tyler 2000, no pet.) (testator’s use of her name as part of title of trust she had previously created was insufficient to constitute signature to express her approval of dispositive provisions of holographic instrument). *See Ajudani v. Walker*, [177 S.W.3d 415](#), 418 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

#### **c. “Wholly in Testator’s Handwriting” Requirement**

The policy supporting the probate of holographic wills is that having a will entirely in the testator’s own handwriting affords a safeguard against forgery and fraud, which the attestation of witnesses is otherwise thought to provide. If the will consists primarily of the testator’s handwriting but also other words typewritten, printed, or written by someone other than the testator, Texas courts apply a “surplusage” rule. The will is entitled to probate if the words not in the handwriting of the testator “are not necessary to complete the instrument in holographic form, and do not affect its meaning.” *Maul v. Williams*, [69 S.W.2d 1107](#), 1109–10 (Tex. Comm’n App. 1934, holding approved).

Certain other jurisdictions apply an “intent theory,” which invalidates an unattested will if the testator “intended” the part not written by him to be a part of his will (even though the language may not affect the provisions of the will). Thomas E. Atkinson, *Law of Wills* 357–59 (2d ed. 1953).

#### **d. Date Not Required**

Texas law does not require that a holographic will be dated. *Gunn v. Phillips*, 410 S.W.2d 202, 207 (Tex. Civ. App.—Houston 1966, writ ref’d n.r.e.).

### **2. Testamentary Intent**

The holographic will must also satisfy the other general requirements of a will (i.e., that it be written with testamentary intent and that the testator have testamentary capacity). Many of the reported cases regarding testamentary intent have involved holographic wills. A North Carolina court has held that a holographic will can satisfy the testamentary intent requirement even though it speaks in terms of request (instead of direction) and even though it does not specifically say that it is to take effect at death (provisions for property disposition and funeral arrangements indicated intent that the instrument take effect at death). *Stephens v. McPherson*, 362 S.E.2d 826 (N.C. Ct. App. 1987).

### **3. Self-Proving Affidavit May Be Used**

Section 60 of the Texas Probate Code specifically allows the testator to add a self-proving affidavit to the holographic will at the time of its execution or afterward. [Tex. Prob. Code § 60](#). Otherwise, a holographic will may be proved in probate by two witnesses to the testator’s handwriting. [Tex. Prob. Code § 84\(c\)](#). The affidavit must state that it has been “sworn to” by the witnesses and has not merely been “acknowledged” by the witnesses. *Cutler v. Ament*, 726 S.W.2d 605, 607. (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.).

### **4. Construction Problems**

The major problem with holographic wills is not their validity but construction problems that are often generated.

## **G. Execution Ceremony**

For a detailed discussion of the proper procedures for signing a will, see Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. Tex. L. Rev. 413 (1987).