

WILL DRAFTING

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1994-04

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1994

PREFACE

Each client represents a unique combination of assets, family situation and wishes for his or her estate. Thus, each Will which an attorney prepares must be tailored to the client's unique combination of these factors. The process should include

- * Getting complete information about the client's assets, including estimated values and exact form of ownership,
- * Correctly identifying the intended beneficiaries,
- * Learning the client's desires for the disposition of the estate,
- * Exploring with the client the alternatives available to fulfill those desires in an efficient and legally effective manner,
- * And finally ... writing the Will itself and supervising its proper execution.

These steps are just as important for the client with a small estate as for the wealthiest. In fact, on a proportionate basis, a small estate can suffer more from poor planning than a large one. The attorney should remember that each time he or she writes a Will, the potential is there to influence the quality of life for generations of the client's family.

This manual is intended as a general guide to the important components of planning and drafting "simple" Wills, and not as a comprehensive outline on estate planning. It is meant for use with clients whose gross estates, for federal estate tax purposes, will be less than the applicable credit amount allowed under Section 2010 of the Internal Revenue Code (currently \$1 million). Therefore, it contains no discussion of estate tax planning. Estate tax planning is a highly specialized field and should be attempted only by attorneys experienced in that area.

Anne Mitchell, Esq., Editor

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WILL DRAFTING*

I. Overview, Statutory Requirements

Before drafting a Will, the lawyer should begin by becoming familiar with Alabama's probate laws, which are found in Title 43 of the Alabama Code. The following are some general principles that should be kept in mind to help forestall problems with the administration of the Will.

A. General Requirements . To be valid, a Will must be in writing. It must be signed, dated, and witnessed according to all the formal requirements of execution in Code of Alabama §43-8-131. The testator must have testamentary capacity and sign voluntarily. Any failure to meet the requirements of proper execution could result in the Will being invalid.

B. Testamentary Capacity . Testamentary capacity means that the testator is able to comprehend the nature and results of the act of making a Will. A person is considered to have testamentary capacity if at the time of execution that person:

1. Knows that he is executing a Will and the effect it will have,
2. Knows the nature and extent of his property, and
3. Is aware of the "natural objects of his bounty," generally, those having the closest family relationship.

The testator must have this testamentary capacity at the time the Will is executed. If the testator later loses testamentary capacity, it will not necessarily invalidate the Will. Simply having an unconventional lifestyle or demeanor will not result in the Will being invalidated. See Irving J. Sloan, *Wills and Trusts*, (Oceana Publications, 1992), p. 15.

However, if there is any serious doubt about the testator's mental state which could be raised later in a Will contest, the lawyer should obtain relevant information, such as the affidavit of a physician, to attest to the testator's mental capacity.

Being of low mental ability or having a guardian is not a bar to making a valid Will as long as the testator can meet the requirements of testamentary capacity.

Convicts and aliens may make Wills in Alabama.

C. Age Requirements . Anyone over the age of 18 may make a Will and there is no maximum age limit as long as the testator still has testamentary capacity. Ala. Code §43-8-130 (1991).

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D. Identification of Document . A Will is not required to have a title, but the lawyer will usually include one to identify the document as a Will. The introductory clause should:

1. Identify the document as the Will,
2. State the full name of the testator,
3. State any other names used by the testator,
4. Identify the county and state of the testator's residence.

A clause revoking any prior Wills should be included near the beginning of the new Will. See Ala. Code §43-8-136(a)

II. Conference with Client

A. Psychological Concerns . In meeting with the testator, the lawyer will discuss many issues relative to the testator's property and family situation. The lawyer should be sensitive to the client's emotions and the potential for stress related to discussing the disposition of property such as the family home or business, and subjects such as the guardianship of minor children. The lawyer should use patience, probing for information but letting the testator move at a comfortable pace.

B. Explaining the Law . The attorney should explain the legal ramifications of the provisions to be included in the Will. This may include presenting the testator with alternatives and explaining the result of each.

The lawyer should also be prepared to explain areas of the law that relate to assets passing under the Will. This may entail a discussion of tax law, insurance, corporate or partnership law, or real property law. Every question of the testator should be answered fully. If the testator is concerned about a complex area of law that is beyond the lawyer's expertise, then the lawyer should seek the advice of a lawyer who is more competent in that area. It is certainly acceptable to admit incomplete knowledge about a specific area of law and to obtain additional information before completing the client's work.

C. Getting Information . Failure to correctly identify assets and beneficiaries can cause difficulties. The lawyer should get as much information as possible about the testator's financial and family situation. Although the testator may be reluctant to disclose personal information, the lawyer should assure him of confidentiality. The lawyer should also stress the expense and legal complications which can result if the Will is drafted without this information.

III. The Client's Assets

A. List of Assets . During the client conference, the testator and lawyer will discuss the testator's property and make decisions about its disposition. To aid in this process, the testator should make an inventory of assets. A financial statement prepared for a bank is a good starting point, but should not be considered conclusive, since it will not always differentiate between solely owned and jointly owned assets. The inventory should include:

1. Real estate - should give address and description, indicating any property located in other states; copies of deeds should be provided;
2. Stocks - publicly traded or closely held; with respect to the latter, are there "buy-sell" type agreements in effect which will control disposition of the stock; are the former held by the client or in a brokerage account;
3. Bonds - government or corporate; are these held by the client or by a broker or bank;
4. Bank accounts, including certificates of deposit (should give bank's address, account numbers); location of any safety deposit boxes),
5. Trusts in which the testator has an interest, and any pending inheritance;
6. Life insurance owned by testator on her own life or the life of another person (should examine the policies themselves or rely on summary from issuing company);
7. Retirement benefits including qualified plans and IRAs;
8. Commercial Annuities
9. Household furniture and furnishings;
10. Automobiles, boats, other vehicles;
11. Art work and collections, other valuable personal possessions such as jewelry;
12. Businesses owned wholly or partially by the testator (should state type of business: sole proprietorship, partnership, corporation, limited liability company);
13. Debts owed to the testator, whether secured or unsecured;
14. Debts the testator owes, including any guaranties;

15. Addresses of the testator's doctor, accountant, and others to be contacted in the event of death;

16. Cemetery plot location and burial instructions.

A copy of this list should be available to the executor at the time of the testator's death to aid in administration of the estate.

To get a good overall picture of the testator's financial situation, the lawyer may ask to see all the major legal and business papers of the testator. These may include:

1. Recent income and gift tax returns,
2. Divorce decrees, prenuptial or postnuptial agreements,
3. Trust agreements,
4. Birth certificates, and
5. Partnership agreements and LLC or corporate documents,

Id., p. 24. The lawyer should review this information with the testator, taking time to explain assets whose characteristics may require special treatment in the Will. For example, how will buy-sell agreements in effect for closely-held business interests affect their disposition; is any debt callable at death; is insurance pledged to a creditor, etc.

B. Property not Disposable by Will . In making the inventory of assets, the testator will probably list some property that is not disposable by Will because its disposition is already determined by contract outside the Will, or is inherent in the property itself. The lawyer should explain to the testator how such property will pass at the testator's death.

The major categories of property not disposable by Will are:

1. Insurance proceeds or retirement plan death benefits payable to a named beneficiary,
2. U. S. Savings Bonds or any other asset with a "P.O.D." or "Transfer on Death" designation,
3. Jointly owned property of any type. For real property or personal property other than accounts at financial institutions, the governing document must contain specific words of survivorship; under new Alabama Code § 5-24-12, certain accounts are deemed to pass by right of survivorship absent language to the contrary.
4. Interests in trusts over which the testator does not possess, or does not properly exercise, a power of appointment. If the testator possesses such a power, a general provision devising "all property" is not generally

sufficient to exercise the power; rather, the power should be referred to specifically. Ala. Code § 43-8-229.

C. Describing the Property . Care should be exercised in describing property in the Will. The lawyer should avoid using vague descriptions (e.g., "the painting over the sofa") which would make the executor's job more difficult. While it is cumbersome to do so, some testators wish to specifically state which items of personal property pass to each devisee. As an alternative, consider incorporating a separate list by reference. Ala. Code §43-8-139.

Where there is a likelihood that the testator may not own a particular item at the time of his death but may own another similar item, the lawyer should avoid a specific description.

Example: If the testator wants to leave his car to his son, the car should not be described as a 1992 red Ford Taurus, because this car may be replaced. A better clause would refer to "any car owned by [the testator] at death." Daly, p. 45.

If specifically devising real property, the Will should consider including the legal description of the property. A street address may change. If the testator owns several parcels of land, legal descriptions may be essential to designate which parcel is intended for which devisee. The testator should also consider whether a devisee of real property should receive the furnishings and equipment associated with that property. If so, the Will should specifically spell out which equipment and which furnishings are included. Sloan, p. 78.

D. Letters of Intent . In some cases the testator may want to leave a letter of intent to guide the executor in the care and disposition of certain types of property of nominal value. Letters of intent are not binding unless incorporated in the Will by reference. Ala. Code §43-8-139. Otherwise, they are useful only as a guide to the executor.

E. Property Passes Subject to Encumbrance . The testator should be made aware that if property passing under the Will as a specific devise is subject to a lien, security interest, or mortgage, then the property will pass subject to this encumbrance unless the Will provides otherwise. Ala. Code §43-8-228. If the testator does not make a specific direction to pay in full the debt connected with the property, then the executor will not be required to do so.

F. Percentages Instead of Dollar Amounts . The testator may want to limit general monetary devises to a percentage of the value of the probate estate. This is helpful in case the testator's wealth dramatically increases or shrinks in the period between the execution of the Will and death.

Example: I devise the lesser of \$25,000 or ten percent of the fair market value of my probate estate in equal shares to my grandchildren who survive me.

Consider including instructions for determining the value of assets for which there is no established market.

The testator may also consider a clause to control the order of abatement in the event that the estate is insufficient to carry out provisions of the Will. This provision could also be used to reduce a legacy where the testator has made advances of the devised property before death. If this is done, the testator should keep a separate list of advancements which could be stored with the Will. Ala. Code §43-8-231.

G. Discharge of Indebtedness . The testator may want to include a clause that specifically forgives the debt of certain devisees, or he may decide to forgive all debts by a general clause to that effect. Unforgiven debts owed by a devisee will be charged against his or her share of the estate. Ala. Code §43-2-627.

IV. Selection of Executor/Personal Representative

A. Criteria for Selection of Executor. The testator should name in the Will an executor (or personal representative) of the estate. This executor will administer the testator's estate in accordance with the Will and applicable law. If the testator fails to name an executor, the court will appoint an administrator, who will be subject to many restrictions from which the executor may be made exempt. The executor should be someone in whom the testator has a great deal of trust to faithfully carry out the testator's wishes.

Before naming an individual executor, the testator should discuss the decision with the person selected and obtain his or her consent. In the case of a bank or other corporate executor, it is helpful to have a trust officer review the Will and confirm that the appointment will be accepted.

B. Spouse or Relative as Executor . A spouse or other close family member of the testator is sometimes a good choice. The spouse is probably in the best position to know the feelings of the testator, but may not know about the assets of the testator, their location, or the business dealings of the testator. It is permissible to name a devisee as executor.

C. Lawyer as Executor . The testator may ask the lawyer to serve as executor. Generally, (except perhaps in the case of close family members) this should be avoided because it could give the appearance of undue influence. Also, a lawyer who is involved in an active practice may be too busy to devote adequate time to being executor. If the client insists on naming the lawyer as executor, the testator should state to the witnesses that the lawyer did not solicit the appointment.

D. Corporation as Executor . The testator may desire that the executor of his estate be a bank or a trust company associated with a brokerage firm. There can be advantages and disadvantages to this arrangement.

1. Advantages of Corporate Executors .

- * They have departments which are devoted to the management of estates on a day to day, full time basis.
- * They usually have a large staff with varieties of expertise.
- * Unlike individuals, they do not die or move out of state.
- * Banks are subject to an outside auditing authority to ensure they meet certain minimum standards. Daly, p. 29.

2. Disadvantages of Corporate Executors .

- * They may have minimum size requirements for estates and will refuse to serve if the estate is not large enough. (This will automatically exclude the estates of many clients whose Wills fall within the scope of this manual.)
- * They charge fees for the services they provide, which may be impractical given the size of the estate.
- * Most local banks do not have trust departments; however, as more small banks have been acquired by larger ones which do have trust departments, this has become less of a problem. Before naming a bank as Executor, the lawyer should always determine that it has a trust department.

E. Co-Executor. Having co-executors is a good idea where the estate is complicated or where one executor is unsophisticated and needs the advice of a more experienced co-executor, such as a trust department. In choosing individual co-executors, it is important to consider how the people relate to each other. If the co-executors dislike each other and cannot cooperate, then they should not be paired. Unless the Will specifically provides otherwise or the co-executors have delegated authority among themselves, the consent of both executors will generally be necessary before any action can be taken. Ala. Code §43-2-846. This requirement should dissuade most testators from naming numerous co-executors.

F. Alternate Executor . The Will should name at least one alternate executor to serve if the original executor predeceases the testator or is otherwise unable or unwilling to serve. By naming an alternate executor, the testator may avoid the expense of adding a codicil to the Will, executing a new Will, or at worst, subjecting the estate to the added cost and inconvenience of a court-appointed administrator.

G. Exemption from Bond, Accounting, and Inventory . It is generally advisable to include a clause in the Will exempting the executor from posting bond, and from filing an accounting or inventory in court. Ala. Code §§43-2-835, 851. If the testator does not trust the executor enough to provide exemption from these statutory requirements, then the testator should be advised to find someone else in whom he has more confidence.

H. Compensation . The Alabama Code states that the executor may receive "reasonable compensation." Ala. Code §43-2-848. Factors to consider in determining

what is reasonable are listed in this Code Section. If any executor performs extraordinary services, a court may allow extra reasonable compensation. The Will may include a provision regarding compensation for the executor which is greater or lesser than that provided by the Alabama Code. Compensation may be stated as a dollar amount, a percentage of the estate or an amount determined by a corporate executor's fee schedule. In addition to compensation, the Will should provide for reimbursement of out-of-pocket expenses reasonably incurred, including litigation costs.

The testator may also wish to provide for the executor to serve without compensation, but if the executor considers that the compensation provided for in the Will is inadequate, the executor may renounce the pertinent provision of the Will and have the probate court rule on the issue of reasonable compensation. Id.

I. Powers of Executor . Review of the testator's assets should guide the lawyer in determining the powers the executor will require in order to properly administer the estate.

The Alabama Code includes as part of the Probate Procedure Act (the "Act") Sections which grant certain powers to the executor. These powers deal mainly with the executor's ability to dispose of the testator's property or care for it in the period before its disposal. Ala. Code §§43-2-839 through 844.

The Act requires that the executor act in a reasonable manner and grants authority to do such things as insure assets, abandon personal property determined to have no value, pay taxes, assessments and other expenses, employ necessary persons such as accountants, appraisers, and attorneys, and prosecute or defend any claims of or against the estate. These powers and others are available to the executor without a specific provision in the will; however, some of these powers such as the power to sell assets are subject to prior court approval.

Most testators will want the executor to be able to sell assets for purposes of distribution or payment of expenses without the delay and expense of a court proceeding. It is advisable to include in the Will specific powers to sell, to invest in assets other than those on the "legal list" in Ala. Code §19-3-120 et seq., and other powers which the lawyer considers necessary to administer the client's assets. Also, most individual executors will not have ready access to the relevant Code provisions. The following is an example of a simple powers clause:

In addition in any powers granted by law, I hereby confer upon and vest in my Executor full power of management, control and disposition of my estate, including, without limitation, the power to sell at private sale all or any part of my estate, at such price and on such terms and conditions as my Executor may see fit; to invest in such property as the executor considers reasonable and appropriate, including without limitation common stocks and other corporate securities, notwithstanding that such investments are not otherwise permitted to fiduciaries by law; to vote any stock standing in my name; to retain any securities or other assets

belonging to my estate, regardless of whether the same otherwise constitute a proper investment of trust funds; to lease any real estate owned by me for such duration and on such terms and conditions as my Executor may deem advisable; to borrow any sum of money which my Executor may deem advisable for the protection and proper administration of my estate, and for the purpose of securing the same to pledge, hypothecate and mortgage any or all property belonging to my estate. All of said powers may be executed by my Executor without order of any court.

J. Payment of Debts . The Will generally includes a clause instructing the executor to pay all the legitimate, unsecured debts of the testator, including funeral expenses and the costs of final illness. Avoid using vague phrasing such as "all fair debts" which could raise an argument regarding an old, discharged debt. The testator should understand that a general direction to pay debts will not require payment in full of secured installment debt. The testator is prevented by statute from directing the priority in which unsecured debts are paid. The order of priority is stated in Ala. Code §43-2-371.

V. **Selection and Description of Devisees**

The devisees will generally be those people closest to the testator. The lawyer should resist a request to suggest those to whom property should be devised. The lawyer should ask how the testator wants to dispose of his property and then present the testator with a plan that accomplishes this goal. If necessary, the lawyer can present the testator with several alternatives and let the testator choose among them. Eugene J. Daly, Thy Will Be Done, (Prometheus Books, 1990), p. 32.

A. Identifying the Devisees . In listing the devisees who will take property under the Will, the lawyer should attempt to ensure that the executor can locate and identify them after the death of the testator. The Will should include each devisee's full name including middle and maiden name, where applicable, and any suffixes such as "Junior" or "Senior."

It is also helpful to make a list (not part of the Will) of the addresses of the devisees. This list may be useful not only in locating the devisee, but also, in the case of devisees with common names, in identifying the true devisee. Although the devisee may move, the list may still serve to identify the devisee by reference to his or her former address.

In addition to stating the name of each devisee, the lawyer should know the relationship of that person to the testator. The testator should be careful to give an accurate description of the devisee's relationship. The Will should never refer to individual devisees by their relationship alone. For example, a devise to "my youngest son" could be challenged if a child born out of wedlock claims to be the testator's youngest son. A devise to "my son-in-law" can create confusion if the testator's daughter divorces.

B. Class Gifts . Rather than naming specific devisees, the testator may leave a class gift to an identified group of people. For example, the testator may leave the residue of

his estate to his children, per capita. This avoids the risk of inadvertently leaving out the name of one of the children. If devises are made to a less obvious class, the class must be clearly defined, for example: "my nephews and nieces, that is, all children born to or adopted by my brother, Tom Smith, prior to my death;" or "all persons employed by Smith, Jones & Co., Inc. in Opp, Alabama, on the date of my death."

C. Charities as Devises . A testator making a devise to a charity should specify the correct legal name of the charity as opposed to the popular name and should include the city and state where the charity's principal office is located. The Will should make a distinction between a gift to a local chapter or the state or national organization. The lawyer should determine whether the charity has the power to receive the gift and consider the adequacy of the gift to the task for which the testator wants it applied. For example, many universities require a minimum gift before they will establish scholarship funds bearing the testator's name. Stephenson, Wills, (F.S. Croft and Company, 1947), p.321. The Will should state what happens in certain contingencies, e.g., if the charity changes its name or ceases to qualify as a charity under the Internal Revenue Code.

D. Provisions for Spouse . Generally, the married testator's primary beneficiary will be the spouse. Testators who choose otherwise should be cautioned about the rights of a spouse omitted from the Will entirely (Ala. Code §43-8-90), and the elective share which may be available to a spouse who considers provisions made in the Will to be inadequate (Ala. Code §§43-8-70 through 76).

E. Provisions for Children . It is important to determine which types of children the testator intends to include in the Will. Types of children include:

1. Children born during testator's marriage,
2. "Step children" (not adopted by the testator),
3. Adopted children,
4. Children born out of wedlock.

If the testator makes a devise to "children," he should be aware that "step children" would not be included in the devise, and that illegitimate children of a male decedent would be included only if they had been legitimated prior to the testator's death, or if their paternity is proved after the testator's death. The testator may define "children" by naming those born prior to the date of the Will and referring by description to any born or adopted after the date of the Will. A reference to afterborns avoids the pretermitted child problem (See Ala. Code §43-8-91) and eliminates the need to amend the Will if additional children are born or adopted. If "step children" will be included, the testator should identify their relationship, e.g., "the children of my wife's first marriage."

A Will should never make an outright devise to a minor child (or to an adult incapacitated child). If the child does not have legal capacity to take, then except for very small amounts, a court-appointed conservator will be required to receive the devise and to administer it under court supervision until the child's majority (or removal of disability).

Gifts to persons under age 21 may be made to a Custodian under the Alabama Uniform Transfers to Minors Act ("UTMA"). Ala. Code §§35-5A-1 et seq. The custodian can be, but need not be, the same person as the guardian of the child's person. The selection of the custodian can be left to the executor. The custodian can administer the child's assets in accordance with the statute, can expend funds for the child's benefit, and is required to distribute remaining assets to the child at age 21. If the child dies prior to distribution, the assets must pass to his or her estate.

For either a minor or an incapacitated adult, a trustee can hold the assets for the person benefit until an age specified by the testator, or even for his or her lifetime, rather than being required to distribute at age 19 or 21. Such an arrangement is particularly appropriate for a disabled child, but consider the impact on the child's entitlement to government benefits. The trustee can also be given specific instructions regarding the purposes for which income and principal can be used prior to the final distribution. A trust should provide for an alternate taker in the event of a person's death before final distribution.

The choice of UTMA or trust will depend on the intended duration of the arrangement, the value of the assets involved, the desire of the testator to control the identity of alternate beneficiaries if the child dies before distribution, and other relevant factors.

In naming a trustee, as in naming an executor, the testator has a wide variety of choices. Factors to consider are similar to those discussed in the context of executor selection, with one additional one. Naming a custodian or trustee who is different from the guardian of the child's person has the advantage of providing two people to look after the best interests of the child. It also provides a system of "checks and balances" with respect to distributions. As with co-executors, the testator opting for co-trustees will want to name people who can cooperate. Successor trustees are especially important if the trust will have a long duration. The testator may also include a method by which beneficiaries can appoint a successor.

Although other arrangements are preferable to a conservatorship, it may be advisable to name a conservator in case funds became payable to a minor or incapacitated child or spouse. In this way one can exempt the conservator from bond.

F. Successor Devisee . The testator may name a successor to each devisee in case the original devisee predeceases the testator or disclaims the devise. See Ala. Code §§43-8-290 through 298. This saves the cost of revising the Will if devisees predecease the testator.

If an original devisee predeceases the testator and a successor is not named, devisees to certain relatives will be saved by the anti-lapse provisions in Ala. Code §43-8-224. Otherwise, the devise will lapse and become part of the residuary estate. If no successor to a deceased residuary devisee has been named, and the anti-lapse statute does not apply, the estate may be distributed according to the rules of intestate succession.

G. Order of Death . A devisee who dies at the same time or within five days after the testator's death is considered to have predeceased the testator. Ala. Code §43-8-220.

To avoid application of this statute, the testator might use a simultaneous death clause in the Will. Such a clause might state that should it be impossible to determine the exact order of death of the testator and a devisee, the devisee will be deemed to have died first. This will result in the testator's Will controlling the disposition of assets, rather than the devisee's Will.

Alternatively, the testator may state that a devisee will be deemed to survive the testator only if he or she survives the testator by a certain amount of time, such as six months.

H. Priority of Devises . The testator can state a priority system for the payment of devises under the Will. A priority clause can be useful in case the estate is not large enough to cover all devises in the Will.

There are several different methods of stating the priority of devises. For example:

1. A statement that the devises of one paragraph should have preference over the devises of another paragraph, which in turn should have preference over the devises of a third paragraph, and so on.
2. Inclusion of a general priority clause that the order of preference shall be children, grandchildren, friends, and charities. Daly, p.47.

I. Disinherited Persons . The testator may choose to disinherit a person who would be considered a "natural object of his bounty." This might be a family member who has fallen out of favor. If this person would have inherited from the testator under the rules of intestate succession if not for the testator's Will, he or she will have standing to contest the Will.

There are some things the testator can do to protect the Will against a successful contest by a disinherited person. The Will should name the disinherited person and state the intent to make no provision for him or her. This may be done in a clause which lists all of the testator's close family members. The testator may also leave with the Will references to other documents which may shed light on the decision to omit the disinherited person. In explaining the reason for disinheritance, in the Will or in another writing, the testator should be aware that while the desire to state the reason for disinheriting a family member is understandable, inappropriate statements could constitute libel and lead to a defamation suit.

It is not required and definitely not recommended that the testator leave a nominal amount such as one dollar to a disinherited person. The executor may have difficulty closing the estate if the devisee refuses to accept the nominal gift.

An "In Terrorem" clause states that a devisee who contests the Will will forfeit any devise. (It is implied that such a contest must be unsuccessful.) If this type of clause is

used the testator should include an alternate devisee to take the devise should the provision be triggered. Consider the effect of the anti-lapse rule in this contract. See paragraph V F above. If probable cause for contesting probate exists, such a clause may not be upheld. Sloan, p.88. An "In Terrorem" clause is unlikely to deter a person to whom only a small amount is devised.

J. Divorce . A divorced spouse will automatically be eliminated from the Will and any devise to him or her will go to the alternate takers. Divorce also revokes any appointment of the former spouse as executor or trustee. Therefore, any divorce decrees should be stored with the Will. Generally, the testator will want to amend the Will after divorce. Ala. Code §43-8-137 (1991).

K. Conditional Devises . The testator may make a devise on the condition that the devisee does or refrains from doing certain activities. These types of provisions probably should be avoided in most cases. Furthermore, if the condition is against public policy, a court will not enforce it.

Example: A clause stating that a daughter shall be a taker under the Will only if she divorces her present husband.

VI. Residuary Clause

The Will must have a residuary clause to dispose of any property not specifically devised. If the Will does not have a residuary clause and the testator inadvertently fails to provide for the disposition of an asset, that asset will be disposed of by the rules of intestate succession. Ala. Code §§43-8-40 et seq.

Usually, the residue of the estate goes to the testator's most favored devisee or class of devisees. The testator should be careful not to make so many specific or general devises that the residuary clause is unacceptably small. Thomas L. Shaffer, The Planning and Drafting of Wills and Trusts, (Foundation Press, 1972), p.56.

A. Percentages Instead of Dollar Amounts . If the testator decides to divide the residue among several legatees, this should be done by percentages rather than by dollar amounts. The lawyer should make sure that the percentages add up to one hundred percent. Daly, p.46. Another alternative is to direct that each residuary devisee will take an equal share.

Example: "I devise my residuary estate in equal shares to my five children."

B. Successor Devisee . The naming of a successor devisee (discussed above) is equally, or even more, important if the residuary devisee predeceases the testator. If there is no alternate devisee, and if the devisee was not a descendant of the testator's grandparent, so that the "anti-lapse" statute, Ala. Code §43-8-224, applies, the residue will be subject to the intestate rules.

VII. Guardians.

The testator should appoint a guardian of the person for any children who may be minors at the time of death. A guardian may also be appointed for certain incapacitated adult relatives.

Factors to consider include:

1. Family relationship,
2. Residence,
3. Financial situation,
4. Temperament,
5. Moral values,
6. Stability and reliability. Daly, p.63.

The testator will want to take the child's feelings into account. A testator who chooses to consult the child about the proposed guardian should be careful not to scare the child.

Once the testator has decided on a person to serve as guardian, that decision should be discussed with the selected person. The person should understand the gravity of the appointment and agree to accept it before being identified as such in the Will. The testator may also name a successor guardian, particularly if there are very young children and an older person (such as a grandparent) is named as the initial guardian.

In the case of married persons, it is best that both agree on the selection of the guardian.

VIII. Mailing a Draft of the Will to the Client.

Once the Will has been drafted, if time permits, the lawyer should mail a copy to the testator, with a letter to explain the major clauses. The client should be cautioned not to sign the draft copy. Most instances of improper execution arise because a Will was signed without an attorney's supervision. Mailing a draft copy for the client's review saves attorney time and allows the testator to review the document at leisure, rather than in the lawyer's office.

IX. Witnesses and Execution

Alabama law requires two witnesses. Ala. Code §43-8-131 (1991). Study the requirement for execution carefully. Ideally, each witness should witness:

1. The testator declaring the document to be his Will,
2. The testator signing the Will voluntarily
3. The testator confirming an understanding of the consequences of the document,
4. The other witness(es) signing the Will.

The testator should state to the witnesses that the document is his or her Will. The testator should ask the witnesses to witness the signing of the document, and should sign and date the Will while they watch. Most lawyers have the testator initial each page (although this is not a legal requirement, it diminishes the chance of anyone alleging that pages were added or

substituted after the document was executed). The testator should then ask each witness to sign. Sloan, p.35.

If any last minute changes were made to the Will in writing, both the testator and the witnesses must initial them to ensure effectiveness. If time permits, reprinting a page to incorporate such changes is highly preferable.

Although this specific procedure is not required for a valid Will, it is the procedure to which most probate courts are accustomed, and its use avoids most challenges based on improper execution.

If the will disinherits a close relative or contains any controversial provisions, the attorney may request that the testator state his or her intent regarding those provisions to the witnesses.

A. Testimonium Clause . The witnesses should sign at the end of a short clause called a "testimonium clause."

This testimonium clause should include:

1. A brief statement of what the witnesses saw,
2. The witnesses' addresses,
3. The number of pages in the Will. (to avoid a contest based on a missing page.) Jones, Alabama Wills Manual, (Wills Manual Service Publishers, 1965), §XIII.

B. Criteria For Witnesses . At least one Witness will be required to testify in order for the Will to be admitted to probate, if it is not self-proved, Ala. Code §§43-8-132, 133. Witnesses should be adults.

Ideal witnesses are:

1. In good health,
2. Younger than the testator,
3. Able to understand and describe what they witnessed,
4. Likely to be easy to locate even if they move,
5. Acquainted with the testator. Sloan, p.34.

Ordinarily, a person named in the Will as a devisee should not be a witness. Although this will not invalidate the Will, it may give rise to an inference of undue influence. However, this would not be the case if a devisee would have received more through intestacy than under the Will. Daly, p.40.

C. Lawyer as Witness . The testator's lawyer is a good choice as a witness because a lawyer may be easier to locate than a lay person. Simply being in the room when the Will is executed does not make the lawyer a witness. The lawyer must follow the same procedure as any other witness. Weaver v. Grant, 394 So.2d 15 (Ala. 1981).

D. Self Proving Provision . Alabama has a self proving statute which should eliminate the need to produce witnesses to probate the Will. At the same time that the witnesses sign the Will, the lawyer should have them sign an affidavit attached to the Will which describes the events witnessed. When notarized, the affidavit stands in the place of the witness testimony at a probate hearing. The form of the affidavit is provided in Ala. Code §43-8-132.

Before passage of the self proving statute, many lawyers included an extra third witness just to be safe. The self proving statute has generally made this unnecessary.

E. Duplicate Originals . There are differences of opinion regarding the execution of duplicate original Wills. If a duplicate Will is executed, it should be stored in the lawyer's files. If the duplicates were in the testator's keeping and one is missing, there will be a rebuttable presumption that the Will was revoked by the testator destroying one of the duplicates. Stiles v. Brown, 380 So.2d 791 (Ala. 1980).

X. Storing the Will

The original Will should be kept in a safe place where it can be readily found by the executor, along with any letters of intent and the list of the testator's assets compiled during the client conference. Burial or other funeral instructions can also be stored with the Will in an envelope addressed to the executor. Although it is permissible to include such instructions in the Will itself, the testator should keep in mind that the Will may not be read until after burial.

Many clients will choose to keep the original in a safe deposit box. Even if no one else has authority to enter the box, banks have a procedure allowing the Will - but nothing else - to be removed for probate. At worst, a court order can be obtained allowing entry of the box for removal of the Will. After probate, of course, the executor will have full access to the contents of the box.

The lawyer should keep a copy of the Will and a reference to the location of the original Will. A testator who intends to keep the original in a safe deposit box may want an extra copy to be kept at home for easy reference. This copy should not have original signatures and should be clearly marked as a "copy."

Before giving the original Will to the testator, the lawyer may fasten a note of warning stating that the document is an original Will and that any alterations could result in its being invalid. Sloan, p.43.

The testator may want to give copies of the Will to his or her accountant and business advisers, but should be discouraged from giving copies to family members or other devisees.

XI. Revocation and Amendment

A. Revocation Clause . A Will may be revoked by the testator at any time before death. The best way to revoke is by an express clause in a later Will stating that the testator revokes all previous Wills and codicils. Though this phrase may seem simple, its

absence can result in the new Will revoking the old Will only to the extent that it specifically contradicts it. Ala. Code §43-8-136.

B. Revocation by Destruction . A Will can also be revoked by tearing, burning, mutilating or otherwise destroying it. In addition to physically destroying the Will, the testator must also have the requisite intent to revoke the Will. Id. Intent without act is not enough.

C. Amendment, Codicils . A Will may be changed either by adding a codicil or by writing a new Will. There are advantages and disadvantages to each method. Generally a minor change can be accomplished by codicil, but an entire new Will should be used for major changes.

Simple codicils have the advantage of being less expensive than a complete new Will. A codicil is subject to all the formalities of the Will itself and has to be executed in the same manner. Ala. Code §43-8-1 (1991). A codicil is intended to affect only the specific provision of the Will that it is drafted to amend. A lawyer should be careful not to write a codicil which inadvertently goes beyond the testator's intention or which accidentally contradicts some other provision in the Will.

Codicils are disfavored by some lawyers because they may make the Will difficult to follow and cause confusion. One codicil to a Will is probably not a problem, but if codicils begin to multiply, it is better to draft a new Will.

A new Will generally is better for changing significant devises. If changes are made in a totally new Will, the affected devisee will not know of the prior Will's provisions, and therefore will not be prompted to challenge the Will.

D. Reasons to Amend . There are many events which could trigger the need to change a Will. These can include:

1. A change in wealth - positive or negative,
2. A change in marital status,
3. A move to a new state,
4. A changed relationship with a devisee or named fiduciary,
5. Birth or adoption of additional children,
6. Death of a devisee or named fiduciary,
7. A change in relevant law. Sloan, p.57,
8. Change in form of ownership of significant assets.

The testator should be encouraged to review the Will periodically, thinking about any of the factors listed above that would require change in the Will. The testator should be cautioned to consult a lawyer to make any such changes.

E. Saving Old Wills . While revoked Wills may be saved to show a pattern of intent of the testator, they should be kept in the lawyer's files where former devisees will not have access to learn of changes and possibly be encouraged to challenge the latest Will.

Be sure that all Wills are dated so that a court will be able to determine which is the most recent. In addition, the person with custody of a superseded Will should mark the front page of the old Will with the word "revoked" and write the date of the revocation. Daly, p.71.

XII. Checklist for a Typical "Simple" Will

Introduction - testator's name, county and state of residence, statement that this is the Last Will and Testament and that the testator is of sound mind

Statement revoking all prior Wills and codicils

Direction for payment of debts and expenses of administration, with any specific directions regarding the source of payment, abatement, etc.

Description of family members by name and relationship, birthdates of minors, reference to afterborn persons, if desired

Specific devises and general monetary devises, possible reference to memorandum; provision for alternate takers or direction that lapsed devises become part of residue; provision for receipt of any specific items left to minors

Disposition of residuary estate, with provisions for alternate takers; trust or Uniform Transfers to Minors Act provision for minors (or other incapacitated devisees)

Appointment of executor/personal representative (and trustee, if applicable); appointment of alternates to each, with procedure for resignation and removal, if desired; provision for compensation, if desired

Grant of administrative and investment powers to executor/personal representative (if a trustee is named, incorporate same powers for use by trustee)

Exemptions from bond, inventory, accounting

Provision to govern deemed order of death (optional)

Other administrative provisions related to particular assets

Testimonium clause, signatures of testator and witnesses, date of execution

Self-proving affidavit

XIII. A Selected Bibliography

Form books for Wills include:

Wills, Trusts, Estate Planning Forms edited by the Prentice Hall Editorial Staff

Forms of Wills, Trusts, and Family Agreements, with Tax Ideas by William J. Casey,

New York Wills and Trusts; Law, Forms, Taxes by Elmer Lee Finger,

Form books with specific reference to Alabama law are published and updated periodically by the trust departments of AmSouth Bank of Alabama and Regions Bank.

Older works include:

Clauses in Wills and Forms of Wills by William D. Rollinson,

Gordon's Annotated Forms of Wills by Saul Gordon.

General business and law form books (such as the Bittker & Eustice series) also include Will forms.

The Alabama Will Manual Service edited by Thomas L. Jones and John C. Payne should be consulted for Will clauses with annotations for Alabama law.

Treatises include:

Wills, Trusts, and Estates, Including Taxation and Future Interests by William M. McGovern,

The Law of Wills by Thomas E. Atkinson,

Family Wealth Transactions by Jesse Dukeminier, Jr.

Older treatises include:

The Law of Wills by George W. Thompson, and

The Law of Wills by W. D. Rollison.

Page on Wills by William Hurbert Page is a multi-volume treatise. Many of the treatises also contain forms and model clauses.

Shorter works include:

Thy Will Be Done by Eugene Daly and

Wills and Trusts by Irving J. Sloan, both of which are acknowledged for their usefulness in the presentation of this manual.

Wills and the longer Drafting Wills and Trusts Agreements, both by Gilbert T. Stephenson, are older works but are still useful and pertinent.

Selected Essays in the Alabama Law of Decedent Estates, edited by Wythe Holt, contains selected law review articles dealing with intestate succession, powers of appointment, and intent of the draftsman, among others.

The Planning and Drafting of Wills and Trusts by Thomas L. Shaffer might also be consulted for a less structured philosophy of the law of Wills.