DRAFTING WILLS
AND
THE PROBATE PROCESS

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This chapter will serve as guidance in the drafting and probating of a will.

Definitions of Common Terms

A) Will - A will is a written or spoken directive that tells the state what the individual wants to happen to his property at the time of his death.

B) Testator(rix) - Person who has written a will which is in effect at the time of death.

C) Executor(rix) - Person appointed to administer the estate of a person who has died leaving a will.

D) Bequest - Generally refers to gifts of personal property.

E) Specific bequest - Gift of a certain article of personal property to a certain person.

F) General bequest - Gift payable out of the general assets of the estate.

G) Demonstrative bequest - Gift of money that must be paid from a particular source.

H) Residuary bequest - Gift of whatever is left after all other bequests are made.

I) Devise - Generally refers to gifts of real property.

J) Specific devise - gift of a certain piece of real estate to a certain person.

K) Residuary devise - Gift of remaining real estate after all other devises.

L) Issue - A person’s children or other living descendants.

M) Per stirpes - By representation.

N) Per capita - By number.

O) Lapse - The termination of a gift made by a will caused by the death of the intended beneficiary or the failure of the beneficiary to meet some condition required before receiving the gift under the will.

P) Contingent beneficiary - A person or entity named to receive a gift under the terms of a will, trust or insurance policy, who will only receive that gift if a certain event occurs or a certain set of circumstances happen.

Q) Codicil - These instruments are used to amend or revoke all of or a portion of a will. They must meet the same statutory requirements as a will. MCA §91-5-1
DRAFTING A WILL

Types of Wills

Anyone who is over age 18, of sound mind, and not under duress may execute a will. Witnesses must be over 18, of sound mind, and should not be receiving any gifts from the will.

There are 3 types of wills recognized by the State of Mississippi. MCA § 91-5-1

1. Holographic – A holographic will must be completely handwritten and signed at the end of the will. Anything that follows the signature will be disregarded. Holographic wills do not need to be witnessed and it’s better that they are not. Extrinsic documents must also be completely in the testator’s handwriting.

2. Attested – An attested will must be witnessed by two witnesses. Witnesses must know that they are attesting the signature of a will. It is a good idea to have the witnesses sign an affidavit at the time they witness so that they will likely not be needed later during the probate process. Extrinsic documents that are referred to in the will must be in existence at the time the will is executed and must clearly be referred to and identified by the will.

3. Nuncupative – A nuncupative will is an oral will. An oral will must be made at the time of the testator’s last sickness. It also must be intended to be his last will. Two persons must witness the declaration and be able to testify to what they heard. An oral will must be probated within 6 months of the date of the declaration unless within 6 days of the declaration, it was reduced to writing. Real property cannot be conveyed by an oral will. MCA § 91-5-15

Wills do not have to be dated or numbered. However, it is a good idea to include a date on the will. This could be important if a will has been previously revoked by another will or for determining the mental capacity of the testator. Though not necessary, an attorney may have his client sign or initial on every page.
Interviewing a Client Prior to Preparing Estate Planning Documents

When assisting a client in drafting a Will, you should be prepared to discuss a range of issues with the client. While obtaining a list of the client’s assets is an essential part of drafting a will, one should also inquire about the client’s family. Some of the more relevant questions are:

1) What is the client’s marital status?

2) Are there children and/or stepchildren? And if so, what are their ages?

3) If the children are minors, who would the parents trust to be Guardian?

4) Does the client have any charitable intentions?

5) Who does the client want to be Executor?

Included at the end of this chapter is a sample Client Questionnaire.

General Considerations when Drafting a Will

1. Guardianship - If the client has minor children, special will provisions should be suggested. In most cases, when a married individual dies, there is usually a surviving spouse that remains the guardian of the minor children. However, what happens when the surviving spouse dies, or if both spouses die in a common accident? Parents of minor children can provide a testamentary appointment of guardian(s) in their last will and testament. If the decedent’s will does not appoint a guardian, then the court will appoint one for the children.

2. Asset Management - What happens if the minor inherits from the decedent(s)? In most instances, unless the decedent’s will provides otherwise, a guardianship will be established by the court to manage the estate of the minor child. Guardianships are very expensive and the guardian must get court approval prior to making most disbursements. Suggesting these special provisions will allow the client to name who will take care of their children should anything happen to both parents.

3. Incompetent Beneficiaries - A client that may have an incompetent beneficiary should be advised of the same special provisions as a client with minor children. The attorney should recommend that the client appoint a guardian for the beneficiary in the will and that a trust with supplemental needs language be established under the will to manage the beneficiary’s assets.
4. Children Born or Adopted after Execution - MCA §§91-5-3 and 91-5-5 provides that if a decedent’s will does not provide for, nor disinherit a child, then that child shall succeed to the same portion of the decedent’s estate as such child would have been entitled to if the decedent had died intestate. MCA §93-17-13 provides that an adopted child shall inherit from and through the adopting parents just as if the child were naturally born to the decedent.

5. Disinheriting a Child - MCA §§91-5-3 and 91-5-5 provide that a decedent’s will must specifically state the testator’s intention to disinher the child. Simple not mentioning the child will not accomplish the testator’s intent to disinher.

6. Debts - MCA §91-7-91 provides that debts of the decedent are usually paid from the residuary estate beginning with the decedent’s personal property. This is commonly referred to as Abatement. However, if a testator wishes to direct otherwise, he or she may do so. For instance, it is common for a testator to provide that any liabilities associated with a given asset should follow that asset. However, there may be instances in which the testator wishes for the beneficiary to take an asset free of any debt; this is generally referred to as Exoneration.

7. Insurance Policies (Casualty) - The testator’s will should also provide where certain insurance claims shall pass.

8. Taxes - If an individual’s estate is sizeable, it may be subject to federal and state estate taxes. Federal tax laws provide an exemption amount, which is currently $5,120,000 for 2012. In 2013, it could drop down to $1,000,000. If an individual’s estate is worth more than the exemption amount, it will be subject to federal estate taxes (35% in 2012 and possibly 55% in 2013).

9. Waiver of Appraisement, Bond, Inventory and Accounting - Mississippi’s probate laws require that an Executor must provide bond, inventory, appraisement and accounting when probating a will. However, most of these obligations may be waived by the chancery court hearing the probate proceeding. If the testator wishes to waive these requirements, then a provision must be provided in the will stating such.
Spousal Protections

Spouse cannot be Disinherited

One limitation of the individuals’ right to dispose of their assets is the decedent’s inability to disinherit a surviving spouse. If the surviving spouse elects, the least that a spouse can leave to the surviving spouse, if the will is renounced, is a child’s share. Accordingly, there are two scenarios contemplated by the statutes:

1. If the will makes no provision for the surviving spouse, the will is automatically renounced by operation of law and the surviving spouse will inherit as if the decedent died intestate;

2. If a will does provide for the surviving spouse, then the will provisions control, unless the surviving spouse renounces the will. If the second scenario occurs, the surviving spouse must renounce the will within 90 days of the Order to probate the will. If a valid renunciation is timely filed, then the surviving spouse will inherit as if the deceased spouse had died intestate.

However, under each scenario, the surviving spouse’s inheritance may be limited upon the size of the surviving spouse’s separate estate.

Homestead Allowance

In both testate and intestate estates, the surviving spouse has homestead rights in the marital home. The surviving spouse has the right to exclusive use and possession of the homestead, whether or not the deceased spouse’s will makes a provision for the same.

Other Spousal Rights

Mississippi law provides that certain properties in intestate and testate estates are exempt from payments of debts through administration of an intestate estate. Exempted properties are those such as clothes and other personal properties not exceeding $10,000, and up to $50,000 of life insurance proceeds. These exempt assets pass directly to the surviving spouse, and are not to be used for payment of debts of the decedent. In addition, Mississippi law also provides that the surviving spouse has a right to one year support from the decedent’s property.

Will Contest

Will contests can arise for a variety of reasons. If the client expresses concerns of a will contest and fighting amongst the beneficiaries, it may be advisable to discuss the possibility of a forfeiture clause in the client’s will. These clauses generally provide that if any beneficiary contests the probate or the validity of the will, then all benefits provided to that beneficiary are revoked and instead shall pass to the remaining beneficiaries of the will.
PROBATING A WILL

The purposes of probate are: 1) To collect the decedent’s assets; 2) To pay the claims of creditors; 3) To distribute the decedent’s assets in accordance with the will.

Do you have to Probate a Will?

Legally, there is no requirement to probate a Will. However, there are numerous reasons why a probate proceeding should be instituted. For instance, probate proceeding begin the tolling of statutes of limitations with regards to creditors and will contest.

Non-Probate Assets

These are assets that pass automatically by operation of law to a beneficiary at the time of the decedent’s death. The following are a few examples of assets that may avoid probate. Please note that even though an asset may avoid probate, that asset is not excluded from determining the decedent’s gross estate of federal or state estate taxes.

1. Life insurance and retirement plans generally have a named beneficiary and therefore would pass outside of probate. However, in some instances, these assets will pass to the estate if the decedent fails to name a beneficiary or if the decedent actually names his estate as beneficiary.

2. Bank Account and Certificates of Deposit may also be held as “payable on death” or as joint tenants with rights of survivorship. If so, these assets will pass outside of probate.

3. Real Estate may also be a non-probate asset. In many cases, a decedent will own real property jointly with rights of survivorship with another individual, and in that instance the property will pass to the survivor automatically outside of probate. Please note that real estate is a unique asset. If a decedent owned real estate individually and that property passes through the estate, the ownership of that real estate vests immediately at the time of death in the beneficiary under the decedent’s will. This is important when paying the debts of the decedent. Personal property is used first to pay the debts, but if the personal property is insufficient to pay all of the debts, then the real property may be sold.

Forms of Probate

Common Form

1. Notice does not have to be given to anyone, although it is advisable to do so. These proceedings are usually one-sided ex parte hearings with the judge.

2. MCA §91-7-23 provides that after the completion of a common form proceeding, anyone can contest the validity of the will within 2 years of the date the will is admitted. Moreover, this two year period is suspended for minors or incompetent persons and in the case of fraud.
3. The use of a common form proceeding is generally seen more often due to its simplicity and because it takes less time to complete.

Solemn Form

1. All interested individuals must be summoned and made a party to the proceeding. Moreover, any party to the proceeding may request that a jury determine if the decedent’s will is valid.

2. A solemn form proceeding is binding on all parties. Therefore, once complete, the estate is closed and all parties are forever barred from bringing a will contest.

3. Typically a solemn form proceeding is more expensive and takes longer to complete the probate process. However, this method may be preferred if a will contest or other dispute is likely.

The Probate Process

1. Decedent’s Will - The first step in the probate process is to contact the surviving heirs to determine if the decedent had a Will. If a Will does exist, arrange a meeting with the surviving heirs.

2. Collect Relevant Information and Educate the Client - All of the following should be covered in the initial meeting with the interested parties:

   Executor - Examine the decedent’s Will to determine who is named Executor. Explain the duties and responsibilities of the position to that person to ensure that they are qualified and willing to serve in that capacity.

   Gross Estate - In addition to being an essential part of gathering the assets of the decedent, the value of the gross estate must be established to determine whether or not the estate is taxable. The Executor should be instructed to make a list of the estate’s assets. For instance, some things normally included in the list should be deeds to any real property, current bank account balances, vehicle titles, and any debt owed to the decedent.

   Educate - Explain the timetable involved. Due to the notice to creditors, the probate process will take at least 90 days. Educating the Executor and the heirs about the probate process and the steps that should be taken will greatly assist the attorney throughout the probate process.

   Creditors of the Decedent - Obtain a list of creditors and the amount of any liability owed by the decedent. This step is essential to sending notice to known creditors as required by the statutes, but this step will also assist the Executor in determining if the estate is solvent or insolvent.
Information - Gather the information regarding the beneficiaries, such as full names and addresses. In addition, if any beneficiary is a minor or incompetent, a guardian should act on their behalf. If the minor or the incompetent beneficiary does not have a guardian, the Executor should petition the court to have one appointed for that beneficiary.

Initiating the Proceeding

1. Venue - MCA §91-7-1 provides that the venue for the probate of a Will shall be in the chancery court of the county in which the testator had a fixed place of residence. If the testator had no fixed place of residence but owned real property, then venue shall be in the chancery court of the county where the land, or some part thereof, is situated. If the testator had no fixed place of residence and only personal property is being disposed of, the venue shall be in the chancery court of the county where the testator died.

2. Standing - MCA §91-7-3 provides that anyone interested, including a creditor, may propound the decedent’s will for probate.

3. The Petition to Probate the Last Will and Testament and Letters Testamentary should be filed with the chancery court requesting that the will be admitted to probate. The Petition shall set forth all relevant facts and should pray for an order admitting the will to probate. Bond must be posted unless the court or the decedent’s will waives the same. However, it is common practice to request in the Petition that bond, inventory, appraisement and accounting be waived.

4. Executor - The Executor named in the decedent’s will must be qualified to serve in accordance with MCA §91-7-35. If the Executor is qualified and willing to serve, this should be set forth in the Petition to Open Estate.

5. Oath - MCA §91-7-41 requires the Executor to take an oath regarding the execution of his or her duties. This is a separate document filed with the court once the order is issued by the court appointing the individual as Executor. The language of the Oath is statutory and can be found in MCA §91-7-41. The Oath should not be executed until after the order admitting the will to probate has been issued by the court.

6. Attached to the Petition, the attorney should submit a true copy of the decedent’s will along with the proofs of will or affidavits from the witnesses. In addition, the attorney, prior to filing the petition will need to complete and submit a civil cover sheet along with the chancery court’s filing fee.
Gathering Estate Assets and Creditor Claims

MCA §91-7-47 provides that the Executor has the right to possession of a personal property of the decedent, and the Executor shall take all proper steps to acquire the possession of any part that may be withheld for him. In addition, the Executor shall also have the right to the possession of all real estate owned by the decedent so far as may be necessary to carry out the will’s intentions.

1. Estate Account - The Executor should establish a checking account in the name of the estate, and all cash and any sales proceeds should be deposited to this account. If possible, all debts and expenses of the estate should also be paid from this account. Commingling of the Executor’s personal funds and the estate’s funds should never occur.

2. Cash - Letters Testamentary issued by the chancery clerk should be submitted to all financial institutions which the decedent’s had deposits.

3. Personal Effects - The decedent’s personal effects, such as jewelry, guns, and furniture, should be secured and inventoried by the Executor.

4. Utilities - Unless needed to preserve and maintain an asset of the estate, all utilities should be turned off.

5. Social Security, Medicare and Medicaid - All governmental entities from which the decedent received benefits should be notified of the decedent’s death.

6. Insurance - The Executor shall file any and all insurance claims for the estate (e.g. life, casualty, and health insurance).

Inventory, Appraisal, and Accounting

1. Inventory & Appraisal

MCA §91-7-93 requires that the assets of the decedent, other than assets such as cash, be inventoried within 90 days of granting of letters testamentary. After the assets are inventoried, MCA §91-7-109 requires that all assets of the estate, other than money and choses in action, shall be appraised by three disinterested parties. Appraisal may be waived by the court “for good cause.”

2. Accounting

MCA §91-7-277 requires that at least once a year, or more often if required by the court, the Executor shall present under oath an accounting of the administration, showing all disbursements and receipts. Proof of disbursements should be attached to the accounting as vouchers.
Creditor’s Claims against the Estate

1. Known Creditors - The Executor must make a diligent effort to identify all creditors of the estate. Once the Executor has identified known creditors, the Executor must mail a notice to the known creditors informing them of their right to file a claim against the estate. The letter must state that all claims not filed within 90 days after the first date of publication of the notice to creditors will be barred.

2. Unknown Creditors - Once the affidavit discussed previously is filed with the court, the Executor shall publish notice to creditors in a local newspaper in accordance with Miss. Rules of Civil Procedure. The notice shall be published for 3 consecutive weeks. After publication, the statute requires that proof of publication be filed with the court. The published notice should state the date that the letters testamentary were granted and that a failure to probate and register a claim within 90 days after the first publication will bar the claim. MCA §91-7-151

Payment of Claims and Expenses

Determining which assets of the estate are available for the payment of expenses and debts will affect the assets to be distributed to the beneficiaries. If a decedent’s will provides instructions regarding the payment of expenses and debts, the testator’s will controls. However, if the will does not provide any directions, MCA §91-7-91 provides that debts and expenses will be paid from the decedent’s personal property first, and to the extent that the debt exceeds the value of the personal property, real property may be sold to pay the remaining debts.

Payment of Federal & State Estate Taxes

The burden of federal and state estate tax shall be apportioned among all heirs of the estate based on the value of the property received by each heir as a percentage of the gross estate. Every apportionment statute, whether federal or state, makes an exception for the testator’s intent.

Closing

Unless authorized by the chancery court, assets of the estate should not be distributed to the beneficiaries until the close of the estate. Creditors must be given the opportunity to probate claims and the Executor must have sufficient assets to pay the properly probated claims.

1. Final Accounting - Unless waived by the court, prior to closing an estate, the Executor must file a final accounting under oath. This accounting shall set forth the balance of all accounts, all disbursements made during the administration, all amounts received during the administration and a list of all other assets such as real property and automobiles. The disbursements should be evidenced by “vouchers.”

2. Notice - The same parties noticed at the opening should be sent notice of the final accounting. If it is not waived by the court, the summons should be issued or publication
should be made for all interested parties to appear not less than 30 days from the service or the completion of publication and show cause, if any, why the final accounting should not be allowed.

3. Petition to Close - The closing petition should set forth all of the steps taken during the probate process. It should specifically set forth the following:

   i) That the Executor is the duly appointed and acting representative;

   ii) That the notice to creditors was published, that the time for filing claims has passed, and that all probated claims, if any, have been paid, and that proof of publication has been filed;

   iii) That the final accounting has been filed as required by law;

   iv) That all expenses, including federal and state estate taxes, have been paid or that the assets of the decedent’s estate were insufficient to necessitate the filing of federal and state estate tax returns;

   v) The petition should also request the court to approve the executor’s commissions and attorney’s fees;

   vi) The petition should also request that after all of the final expenses of the estate are paid and all assets are distributed, that the Executor be discharged.

Included Forms:

- Client Questionnaire
- Will and Instructions
- Healthcare Directive
- Petition and Order to Open Estate
- Notice and Affidavit to Creditors
- Letters Testamentary
- Oath of Executor
- Petition and Order to Close Estate

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