PERFORMING A PRE-MORTEM AUTOPSY: HOW TO DISSECT A WILL SOMEONE ELSE DRAFTED

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CHAPTER 1

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Professional Activities

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Publications and Speeches

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Houston Bar Association Probate, Trusts, and Estates Section Meeting, Houston, Texas, January 26, 2016.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Intermediate Estate Planning and Probate Course for the State Bar of Texas, Dallas, Texas, June 9, 2015.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Metroplex Practice Management Group, Dallas, Texas, July 22, 2014.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Dallas Society of CPAs Convergence 2014, Dallas, Texas, May 8, 2014.

Coping with the Threat of a Retroactive Estate Tax, JOURNAL OF TAX PRACTICE & PROCEDURE (CCH), April-May 2010, at 35.

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The author welcomes any corrections and suggestions for improvement to this outline.

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I. INTRODUCTION.

At some point in your legal career, your neighbor, hairdresser, or in-law will ask a question that will strike fear your heart: "I am sure my will is just fine, but will you look at it and make sure there isn't anything wrong with it?"

How is a responsible lawyer supposed to respond to that question? The answer, my friends, should be an enthusiastic "Yes!" This is a unique opportunity to discover problems before you are stuck with them--it's like performing an autopsy on a body before there is a death.

But if you are anything like the author of this paper, you may find this seemingly simple request to be a daunting task. The asker of this question may very well not want you to find a thing wrong with their will. Nor do you want to spend numerous precious billable hours in the weeds on this task. Where do you begin?

You need a game plan, and that is precisely the point of this outline. The purpose of this outline is to serve as a "how to" manual for dissecting a will someone else drafted in an efficient and effective manner.

II. THE FIRST SWEEP: DO YOU HAVE A VALID WILL?

Your task, first and foremost, is to determine, to the best of your ability, if the document before you is a valid last will and testament. Sure, without grilling the testator about his or her testamentary capacity, testamentary intent, general health conditions, and the proclivity of his family to start a fight, you will never be in a position to say with certainty whether or not a will would stand up to a challenge in court. Without cross-examining the witnesses about what they did or did not observe when they subscribed their names to the will, there will be some uncertainty as to the will's validity.

However, there are plenty of issues you may observe from looking at the original or a copy of a will without interviewing anyone. Problems with a will that might render the will invalid would be strong grounds for you to go back to the testator and say, "I think you should do a new will, and here's why." Borrow from the wisdom of Justice Brandeis's *Ashwander* rules of judicial restraint—don't waste your time thinking about all the things you might do differently when you first look at a will. Ever notice how a Supreme Court justice will decide a case using the most basic proposition of law? They might have the opportunity to make ground-breaking law in a case, but often they won't reach the hard-hitting questions because they found some simpler approach to stating why a law or other case is invalid. "We don't reach the question of *x*, because *y*." That is the whole point of the first pass at a will you are reviewing. You don't have to reach the question of whether the terms of the instrument you are reviewing are any good if the instrument is not a valid will in the first place.

A. Requirements of a Valid Will

A refresher on the requirements of a valid will is in order to help you on your quest. "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."[1] Despite this general definition, the term "will" also includes a codicil and a testamentary instrument that merely appoints an executor or guardian, directs how property may not be disposed of, or revokes another will.[2] Therefore, a writing may be considered a valid will, even if it makes no attempt to dispose of property.

What are the basic requirements of a will?

- a writing;
- the maker of which is identified;
- which is made with "testamentary intent";
- which is made with "testamentary capacity";
- the requirements of execution are met; and
- has not been revoked

(1) <u>A Writing</u>

A will must be in writing.[3] Former law in Texas allowed oral wills in narrow circumstances. However a change in law in 2007 eliminated the possibility of oral wills. Now each and every valid will in the State of Texas must be in writing.

(2) <u>Maker Identified</u>

The identification of the maker of a will should be a relatively easy box to check in a review, but this is an essential element of a will. Won't the signature requirement of a will (discussed below) satisfy this requirement? Maybe yes, maybe no. Any mark made by the maker of a will satisfies the signature requirement—even one that does not specifically

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[1] *Estate of Brown*, 507 S.W.2d 801, 803 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

[2] Tex. Est. Code § 22.034 (2015). All references in this outline to the "Code" are references to the Texas Estates Code, which became effective January 1, 2014, as amended by the legislative changes effective September 1, 2015.

[3] Tex. Est. Code § 251.051(1) (2015).

identify the person.[4] While a photo of a handwritten message scrawled out in lipstick on a mirror stating, "I give all my possessions at my death to my sister. ~X" posted to an individual's Instagram account might satisfy many of the formal requirements of making a will, failure to identify the person who scrawled the message may make such a writing an invalid will.

(3) Testamentary Intent

The requirement that the maker of a will have "testamentary intent" in order for the will to be valid is not a requirement imposed by statute. But Texas case law has consistently upheld the testamentary intent requirement. As one court described it, testamentary intent "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 at his death."[5] Recall that a will is defined in the Code as including a codicil or other testamentary writing even if such writing does not dispose of property.[6] So it seems that the "intent to create a revocable disposition of property" may be enough to establish testamentary intent when the nature of the writing involves the disposition of property, but is not required to determine testamentary intent for every type of will (e.g., codicil, will appointing an executor, or other testamentary instrument not affecting the disposition of property). In essence, the maker has to either want the terms of the writing to have the effect of transferring the maker's property or settling the maker's estate at the maker's death.

How is testamentary intent demonstrable in a will? A writing containing the recital "this is my Last Will" raises a rebuttable presumption of the maker's testamentary intent.[7] Furthermore, the declaration "[i]t is my will and desire" has been held to express testamentary intent.[8]

But sometimes language does not clearly establish whether the maker intended a writing to constitute a will or codicil. Where the words used in an instrument are ambiguous and might be reasonably inferred to be indicative of testamentary intent, extrinsic evidence may be admitted to establish that the instrument was executed with testamentary intent.[9] However, no extrinsic evidence is admissible if the writing itself does not supply *any* words that could be construed as testamentary intent. "No amount of extrinsic evidence can supply absent testamentary intent."[10]

Whether an instrument reflects that the maker had testamentary intent is a matter of law. However, as the reviewer of a will someone else drafted, it is your job to search for key words that would tend to prove that the maker had testamentary intent. Add that to your checklist.

(4) Testamentary Capacity

In order to make a valid will, the testator must have "testamentary capacity" at the time he executes the will. The Estates Code sets out a two prong test to establish testamentary capacity.[11]

a) First Prong: Requisite Age or Status

The first prong of the statutory test for testamentary capacity requires that the maker of a will have attained a certain age, or alternatively, a certain status.[12] The maker of a will must be eighteen (18) years of age or older OR be married OR be a member of the United States armed forces or an auxiliary thereof.[13] This is undeniably the easier prong of testamentary capacity test to meet, because it is a factual matter which can usually be substantiated by readily available evidence (e.g., birth certificate, driver's license, or marriage license).

b) Second Prong: Sound Mind

The second prong of the statutory test for testamentary capacity is summed up with only two words: "sound mind."[14] However, determining whether the maker of a will was of sound mind at the time of the instrument's execution is sometimes anything but simple. When a contestant challenges a will, lack of testamentary capacity is one of the most common grounds for invalidating a will. So in dissecting a will someone else drafted, you cannot help but pay attention to this requirement.

What does it mean to be of sound mind? The maker of the will must have sufficient mental ability to:

[4] *Orozco v. Orozco*, 917 S.W.2d 70, 73 (Tex. App.—San Antonio 1996, writ denied) (X of a person too weak to sign her name sufficed as testatrix's signature to a will).
[5] *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955).
[6] *See* Tex. Est. Code § 22.034 (2015).
[7] *See Shiels v. Shiels*, 109 S.W.2d 1112 (Tex. Civ. App.—Texarkana 1937, no writ) (evidence showed that an instrument purporting to be a last will and testament was only executed by the maker as a prerequisite for the maker to join a masonic lodge).
[8] *Matter of Rogers*, 895 S.W.2d 375, 377 (Tex. App.—Tyler 1994, writ denied).
[9] *Harper v. Meyer*, 274 S.W.2d 904, 906-907 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).
[10] *Straw v. Owens*, 746 S.W.2d 345, 346 (Tex. App.—Fort Worth 1988, no writ).
[11] Tex. Est. Code § 251.001 (2015).
[12] *Id.*
[13] *Id.*
[14] *Id.*

(i) understand the business in which he is engaged;
(ii) understand the effect of the act in making a will;
(iii) understand the general nature and extent of his property;
(iv) know his next of kin and the natural objects of his bounty and the claims upon him; and
(v) collect in his mind the elements of the business to be transacted and hold them long enough to perceive their obvious relation to each other and to form a reasonable judgment about them. [15]

When presenting a will for probate the burden is on the proponent to prove that the maker was of sound mind at the time the will was executed.[16] The fact that a will is self-proved does not shift the burden of proof before the will is admitted to probate.[17] But after the will is admitted to probate, the burden shifts to a contestant to prove that the testator was not of sound mind at the time a will was executed.[18]

There is a large body of case law dedicated to the particularities of whether the maker of a will was of sound mind at the time the will was executed. Most of the intricacies of this body of law are outside the scope of this paper; the focus here is on interpreting whether the words on the paper you are presented with are enough to raise a presumption of the testator's testamentary capacity, not on the actual capacity of the person who executed the document. Nonetheless, a short refresher on testamentary capacity is appropriate.

c) Admissibility of Evidence of State of Mind Before and After Date Will Was Signed

First, remember that the relevant question is whether the maker of the will was of sound mind on the date he or she signed the will. [19] However, even when there is no direct evidence about the maker's acts, demeanor, or condition that tends to show the maker was of unsound mind on the date a will is executed, the maker's mental condition may be determined from lay testimony as to the maker's conduct prior to or subsequent to the will's date of execution. But evidence of the testator's prior or subsequent state is only admissible if the evidence demonstrates that the condition was persistent and had some probability of being the same condition at the time the will was executed.[20] If the evidence of the will maker's mental condition on the date of the will's execution conflicts with admissible evidence of a persistent condition that could have affected his or her mental capacity on the date of execution, questions about the maker's testamentary capacity rest on the weight of the evidence and are questions for the fact finder to determine.[21]

d) Insane Delusion Affecting Will Terms

Second, recall that a will may be denied probate, even if the maker is perfectly capable of handling their affairs, if the will is a product of the maker's insane delusion.[22] An insane delusion is "the belief of a state of supposed facts that do not exist, and which no rational person would believe."[23] The insane delusion must affect the provisions of the will.[24] Thus, if the testator believes he or she was abducted by aliens but otherwise passes the testamentary capacity test, his or her will is not automatically denied probate, if the delusion is not reflected directly or indirectly in the terms of their will. Furthermore, a conclusion based on facts and reasoning, even if illogical, is not an insane delusion that would affect a person's ability to make a valid will.[25] One example of an insane delusion was where the testator believed, against the weight of evidence, that their child had gone to a foreign planet and conspired against the United States, and this belief led to the testator disinheriting such child.[26]

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[15] *In re Estate of Lynch*, 350 S.W.3d 130, 136 (Tex. App.—San Antonio 2011, pet. denied); *Long v. Long*, 196 S.W.3d 460, 464 (Tex. App.—Dallas 2006, no pet.); *In re Estate of Blakes*, 104 S.W.3d 333, 336 (Tex. App.—Dallas 2003, no pet.); *In re Neville*, 67 S.W.3d 522, 524 (Tex. App.—Texarkana 2002, no pet. h.); *Bracewell v. Bracewell*, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex. App. —Fort Worth 1998, no pet.); *Praether v. McClelland*, 13 S.W. 543, 546 (Tex. 1890).

[16] *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983).

[17] *Id.*; *Reynolds v. Park*, 485 S.W.2d 807, 816 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); *Lee v. Lee*, 424 S.W.2d 609, 610 (Tex. 1968); *In re Price's Estate*, 375 S.W.2d 900, 903 (Tex. 1964).

[18] *Cravens v. Chick*, 524 S.W.2d 425, 428 (Tex. Civ. App—Fort Worth 1975, writ ref'd n.r.e., 531 S.W.2d 319 (Tex. 1975).

[19] *Croucher*, 660 S.W.2d at 57; *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968).

[20] *In re Neville*, 67 S.W.3d 522, 525 (Tex. App.—Texarkana 2002, no pet. h.); *Lee*, 424 S.W.2d at 610.

[21] *In re Neville*, 67 S.W.3d 522, 525 (Tex. App.—Texarkana 2002, no pet. h.).

[22] *Lindley v. Lindley*, 384 S.W.2d 676, ___ (Tex. 1964).

[23] *Knight v. Edwards*, 264 S.W.2d 692, 695 (Tex. 1954).

[24] *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 411-12 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

[25] *Id*.

[26] *See Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964).

e) Mental Capacity for Contracting and Guardianships Different Than Testamentary Capacity

Finally, it is important to remember that the standard for a testator to be considered of "sound mind" so that he may be found to have testamentary capacity is a unique legal test. In fact, it is generally recognized as requiring less capacity than the mental capacity required for making a contract.[27] Furthermore, a prior determination that the maker of a will required a guardian is relevant to the determination of whether such individual has testamentary capacity, an individual placed under a guardianship does not automatically lack testamentary capacity.[28] Even if you are reviewing a will executed by someone with diminished capacity, the instrument is not per se invalid.

(5) Execution Requirements Met

Another critical component to the validity of a will is that statutory formalities were followed when the will was signed. Execution requirements include that a will is signed:

i) by the testator in person, or by another person on behalf of the testator who is in the testator's presence and signing at the testator's direction; and
ii) by two credible witnesses who are each at least 14 years old, and who sign their names to the will themselves in the testator's presence.[29]

a) Testator's Signature

The Code requires that a will be signed.[30] Case law has held that virtually any mark by the testator is sufficient as a signature of the testator.[31] There are even cases on record where the signature requirement was determined to be fulfilled, even though the "signature" in question was not in the testator's own handwriting.[32]

Unlike some other states, there is no requirement under Texas law that a signature appear at the end of a will.[33] But be aware that case law holding that a signature in the middle of a will satisfied the signature requirement involved a holographic will.[34] A different result may be reached by a court if a typed will was involved. While a self-proving affidavit has not typically been held to be part of will,[35] Code § 251.105 clarifies that a signature to a self-proving affidavit may be considered a signature to a will if necessary to prove that the will was signed. However, in that case, the will cannot also be considered self-proved.[36]

There is a body of case law providing for a flexible interpretation of the signature requirement. But it is notable that there is a great deal of case law regarding will signatures—these seem to be the type of cases that are often litigated because they are close calls. Perhaps the better lesson is that if you are reviewing a will that has a rubber stamped signature, the testator's initials in place of a signature, a type-written signature by the maker, a signature on the self-proving affidavit only, or a signature in the middle of a will that should be grounds for recommending the maker update the will if he or she has capacity. An uncommon "signature" by the maker of the will seems to be fodder for will contests.

b) Signature By Another Person at the of Testator's Direction

In lieu of a signature by the testator of a will, the Code provides that another person may sign on behalf of the testator, as long as the proxy signs (1) in the testator's presence and (2) at the testator's direction. Case law has held that if another person helps the testator sign a will, the aid must be specifically directed by the testator; the testator's mere acquiescence to help from another person, without the testator asking for help, may cause the will to be denied probate.[37]

c) Attested and Subscribed by Two Credible Witnesses

The Code requires that a will be both "attested" and "subscribed" by two or more "credible" witnesses

[27] *Vance v. Upson*, 1 S.W. 179 (Tex. 1886)*; Hamill v. Brasheer*, 513 S.W.2d 602, 607 (Tex. Civ. App.—Tyler 1981, no writ).
[28] *Evans v. Allen*, 358 S.W.3d 358, 368 (Tex. App.—Houston [1st Dist.] 2011, no pet.).
[29] Tex. Est. Code § 251.051 (2015).
[30] *Id.*
[31] *Orzoco v. Orzoco*, 917 S.W.2d 70, 73 (Tex. App.—San Antonio 1996, writ denied) (holding that the X of a person in a weakened physical state met signature requirement of a will); *Trim v. Daniels*, 826 S.W.2d 8, 9-10 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding that initials of testator met signature requirement).
[32] *See Philips v. Najar*, 901 S.W.2d 561, 562 (Tex. App.—El Paso 1995, no writ) (rubber stamp signature of testator held to satisfy signature requirement); *Zaruba v. Schumaker*, 178 S.W.2d 542, 543 (Tex. Civ. App.—Galveston 1944, no writ) (typed signature by testator held sufficient).
[33] *Lawson v. Dawson's Estate*, 53 S.W. 64, 65 (Tex. Civ. App. 1899, writ ref'd).
[35] *See Orrell v. Cochran*, 695 S.W.2d 552, 552 (Tex. 1985).
[36] Tex. Est. Code § 251.105 (2015); *but see* Tex. Est. Code § 251.1045 and Exhibit D.
[37] *See id.*; *Mulbauer v. Muhlbauer*, 686 S.W.2d 366, 376-77 (Tex. App.—Fort Worth 1985, no writ).

who are each at least fourteen (14) years of age. What do these key words mean? To "attest" means to witness the statutory requirements of a proper will execution.[38] While an attestation clause which recites the statutory requirements of a legally compliant will execution is not required to be included in a will to prove attestation, it has become a standard practice in Texas.[39] To "subscribe" means to sign the will.[40] Note the Code also requires that each witness must sign the will in their own handwriting—a proxy will not suffice for a witness's signature.[41] A will witness is "credible" if the witness is able to describe the attestation.[42] While not required by law, it is a best practice to use only witnesses who are not named in the will. The witness-beneficiary may be "credible," but his or her witnessing the will may cause them to forfeit their bequest by law, defeating the testator's intent.[43] Therefore, it is almost always preferable to have uninterested witnesses attest a will.

d) *Who Must Be Present When Testator and Witnesses Sign Will*

The testator does not have to sign the will in the presence of the witnesses in order to have a valid will.[44] However, the witnesses *must* each sign in the testator's presence.[45] Texas case law has developed a "conscious presence test" to determine whether the witnesses have signed "in the presence of testator." Under such test, a testator who is physically able to see must actually be able to see the witnesses subscribing their names to the will from his or her position, or at most, from such position with a slight alteration.[46] However, the witnesses need not sign the will in the presence of one another for the will to be valid.

e) *Exception to Witness Requirement for Holographic Wills*

Notwithstanding the witness requirements discussed in Code § 251.051, a will written wholly in the testator's handwriting is not required to be attested by subscribing witnesses.[47] A great deal of leeway has been given to holographic wills in the past; courts typically will probate holographic wills if there is not a question regarding the authenticity of the document and the intention of the drafter.[48]

f) *What is Considered "Wholly" Written in the Testator's Handwriting*?

Under the "Surplusage Rule" observed by Texas courts, a holographic will is valid even though it contains words written not in the testator's handwriting if the words not written in the testator's handwriting are not necessary to otherwise establish the requisite elements of the will.[49] Thus, in one case, a document was found to be a holographic will even though it contained a date written in another's handwriting.[50]

g) *Evidence of Tampering*

A testator may have the best-drafted will in the state, but if there is evidence that the will has been substantially altered such that the proponent of the will cannot establish the terms at the time the will was executed, the will could be denied probate.[51] I like to call this the "Don't Take the Staples Out of a Will Rule." If you see staple holes in an original will you are reviewing or note them in a copy of a document you are reviewing—that may, in and of itself, warrant a recommendation that the testator draft a new will. The will's proponent must have the will as it was drafted. This concept is so elementary that it could easily be overlooked.

(6) <u>Has Not Been Revoked</u>

Per Code § 256.152(a)(1) the applicant for the probate of a will must prove to the court's satisfaction that the testator did not revoke the instrument in question. In the ordinary case, where there is an

[38] *Davis v. Davis*, 45 S.W.2d 240, 241 (Tex. Civ. App—Beaumont 1931, no writ).
[39] *See* Exhibit B for a sample witness attestation clause.
[40] *Id*.
[41] Tex. Est. Code § 251.051(3) (2015).
[42] *Lehman v. Krahl*, 285 S.W.2d 179, 180 (Tex. 1955).
[43] *See* Tex. Est. Code § 254.002 (2015) (bequest to subscribing witness is in a will that cannot be proved without the interested witness's testimony is void, unless bequest to subscribing witness does not exceed the statutory share the witness would have received from the testator's estate if he or she died intestate *or* if the testimony of the subscribing witness is corroborated by at least one disinterested and credible person); *also see Wilkerson v. Slaughter*, 390 S.W.2d 372 (Tex. Civ. App.—Texarkana 1965, writ dism'd w.o.j.) (will admitted to probate despite the fact that both subscribing witnesses were beneficiaries, but there was a disinterested witness and a notary who could corroborate will was dually executed).
[44] *Venner v. Layton*, 244 S.W.2d 852, 856 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.); *Davis v. Davis*, 45 S.W.2d 240, 241 (Tex. Civ. App—Beaumont 1931, no writ). However, note that the testator and witnesses may all need to sign in the presence of a notary public in order for the will to be self-proved.
[45] *Id*.
[46] *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).
[47] Tex. Est. Code § 251.052 (2015).
[48] *See Warnken v. Warnken*, 104 S.W.2d 935, 937 (Tex. Civ. App.—Austin 1937, writ dism'd w.o.j.).
[49] *See Price v. Taliaferro*, 254 S.W.2d 157, 161 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.).
[50] *See id.*
[51] *See Mahan v. Dovers*, 730 S.W.2d 467, 469-70 (Tex. App.—Fort Worth 1987, no writ).

original instrument that the applicant believes to be the true and correct original will, the proponent may rely on the "presumption of continuity." Under the presumption of continuity, the will's proponent is entitled to presume that the will has had a continuous legal existence—instead of forcing the proponent to prove the negative (i.e., that the will has not been revoked).[52]

However, different factual situations may give rise to contrary presumptions. For example, where an original will was last seen in the testator's possession and the will cannot be located with reasonable diligence, it is presumed that the testator destroyed the will with the intent to revoke it.[53]

Per Code § 253.002, a will or codicil may be revoked by either (1) a writing executed with like formalities of a will or (2) physical destruction of the document by the testator or some other person acting at the testator's direction and in the testator's presence.

A writing can cancel or invalidate a will in multiple circumstances. First, a will could be revoked in a subsequent will or codicil that expressly revokes prior wills. In addition, where the terms of a subsequent will or codicil are silent as to the effect of prior wills or codicils, the terms in the later will or codicil will trump and operate to revoke the conflicting provisions in the prior will or codicil.[54] The courts will take pains to read the two wills in harmony.[55] Either way, a writing revoking a will must be in a form that could have been "probatable," but it does not necessarily have to be probated in fact to cause revocation of a will.[56] That is, the writing intending to revoke a will must either meet the requirements of a will or codicil (i.e., either be either attested by two subscribing witnesses or be holographic), regardless of whether the instrument it is revoking was attested or holographic.[57] A holographic will may be revoked by an attested writing, and an attested will may be revoked via a holographic writing.

The testator can revoke a will by a physical act such as cutting the entire will or cutting the signatures out of a will.[58] Likewise, writing "VOID" or "CANCELED" over *all* the provisions of a will or codicil would likely be considered revocation by physical act[59] Partial revocations by physical act are not recognized for attested wills in Texas.[60] For example, writing "Canceled" on section of a will would be a partial revocation that would likely be disregarded. Partial revocations are treated as akin to disregarded interlineations in attested wills. However, recall that a holographic will may be revoked and amended in part by a physical act or interlineation.[61]

So if you are reviewing a will someone else drafted, what does all this revocation law have to do with you? Face it, we live in the digital era. In this day and age, when a lawyer is asked to review a will, someone most likely has sent an electronic copy of a written instrument. If not an electronic copy of the instrument, then a paper copy of the will might be provided. Very rarely are lawyers asked to review a signed original of a will. When reviewing someone else's will, it is important to ask questions about where the original is located (if you don't have it in your hands) and whether it is in an identical condition to the instrument you are drafting. Don't battle with presumptions regarding revocation; preempt problems by asking questions about the original will. Recently, I handled a probate, where I had not drafted the will. The decedent had not been my client during lifetime. After the decedent's death, I was sent a scanned copy of the will that looked to be in order. But when I received the original of the will, it was covered in interlineations and notes. One of the notes potentially constituted a holographic codicil. This taught me an important lesson: ask about the original. If you ask about the original of a will, and the maker answers with, "I don't know where it is," it may very well be more cost effective for you to get to work on a new will than it is for you to spend time reviewing their lost will and fight against unfavorable presumptions later on.

B. Plan of Attack for First Pass of a Will

(1) Maker's Signature

In the nature of disposing of the simplest questions first, check to make sure the maker of the will has actually signed the will. How frustrating would it be to pour through an entire document only to find out that what you are looking at is merely an unexecuted draft? The answer to this question is VERY FRUSTRATING. It has happened to me. I was asked to review a new client's will shortly after the death of her husband, and I made some beautiful

52 *Ashley v. Usher*, 384 S.W.2d 696, 700 (Tex. 1964).

53 *Estate of Glover*, 744 S.W.2d 939, 940 (Tex. 1988).

54 *May v. Brown*, 190 S.W.2d 715, 718 (Tex. 1955).

55 *See Hinson v. Hinson*, 280 S.W.2d 731, 735 (Tex. 1955).

56 *But see Chambers v. Chambers*, 542 S.W.2d 901, 905 (Tex. Civ. App.—Dallas 1976, no writ) (will revoked prior wills even though it could not be admitted to probate because it was presented more than four years after the testator's death).

57 *See Brackenridge v. Roberts*, 267 S.W. 244, 247 (Tex. 1924); *Estate of Brown*, 507 S.W.2d 801, 805-06 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

58 *Simpson v. Neeley*, 221 S.W.2d 303, 313 (Tex. Civ. App.—Waco 1949, writ ref'd).

59 *See Dean v. Garcia*, 795 S.W.2d 763, 765 (Tex. App.—Austin 1989, writ denied).

60 *Leatherwood v. Stephens*, 24 S.W.2d 819, 823 (Tex. 1930).

61 *Hancock v. Krause*, 757 S.W.2d 117, 120-121 (Tex. App.—Houston [1st Dist.] 1988, no writ).

notes on the margins about things I would do differently if I were drafting the will, but by-and-large, I thought the document would be fine given the client's stated goals. But then I got to the signature page… The document was not signed by the client. Interestingly, it was notarized. The client was extremely surprised. She thought she had signed the will. We deduced that her husband had gone to the lawyer's office and signed his will and the notary went ahead and placed her signature and seal on the wife's will too. I told the client that she, in effect, had no will. She needed a new will, but I spent a lot of time looking for "nice to change" items before reviewing "need to change" items in her will. From that day forward, I vowed to start my will reviews by first looking at the signature page.

(2) Attestation Clause

Next, knock out the statutory requirements related to witnesses. Check to see if there is an attestation clause which will allow you to raise prima facie evidence that the witnesses attested the will, were credible, and were each at least 14 years of age when they signed the will. See if the witnesses' names are printed anywhere. Note their names. The witnesses names will be helpful in proving up the will later, and also knowing their names will help to make sure they are not also listed as beneficiaries in the will. If the witness is a beneficiary of the will, the maker may not be able to leave property to such person amounting to a partial revocation of the will by operation of law.

(3) Self-Proving Affidavit

Look to see if there is any indication that the "age or status" test has been met. A self-proving affidavit in compliance with Code § 251.104 (see Exhibit C) or the simultaneous execution, attestation and self-proving affidavit from Code § 251.1045 (see Exhibit D) will provide prima facie evidence that the "age or status" test has been met. But no need to examine the self-proving affidavit in detail during the first pass… examination in detail will come during the second pass. The first pass is all about determining whether you have a will or not.

(4) Finally…Flip to the Beginning

Look for phraseology tending to establish testamentary intent in the document, such as "this is my last will and testament." Look for staple holes (hopefully none!) that might tend to raise a question as to whether some of the pages of the will are missing or have been replaced. Check to make sure each page falls in sequential order, or if the will is not paginated, check to make sure the sentences flow from page to page. Remember the will could be denied probate if pages are missing.

Finally, while flipping through the pages, look for any alterations or interlineations on the will. If those are present, analyze whether there is any indication as to when these changes occurred (dated and signed?) or whether the words may possibly stand on their own as a holographic codicil executed with the formalities of a will.

III. THE SECOND SWEEP: CHECKING FOR THINGS ANY ESTATE PLANNING ATTORNEY WORTH THEIR SALT WOULD INCLUDE IN A WILL

So you made it past the preliminary reading. You think you have a will. Now it is time to kick the lawyering up a notch. Your second pass at the will is all about distinguishing yourself from a website purporting to provide an excellent last will and testament on a dime. Many people reading this outline have likely had the opportunity to review a website will. If you have not, chances are you will at some point in the future.

I must admit that I was a little afraid before I reviewed my first website will. I was afraid that I was going to find out that the wills are actually really great work product and that I would have to tell the potential client, "No need to hire me, your $59.95 work product is just fine." Why did I go to law school if my line of work could be outsourced to a computer program?

Thankfully, when I finally reviewed my first online will, I was underwhelmed. The will cut out after-born children (my clients had two after-born children), risked full or partial intestacy with a lackluster residuary clause, contained sensitive private information about the clients (including social security numbers), and contained a patent ambiguity regarding a bequest to a child. I could not have been happier to review such a terrible will.

You may be asking yourself how websites get away with providing such underwhelming products to Texas residents. Isn't that unauthorized practice of law? Texas Government Code § 81.101(c) specifically states that the "practice of law" does not include:

> the design creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.

This cutback to the definition of the term "practice of law" has been called a "direct response" to investigations into websites furnishing legal form, such as wills, to buyers.[62] By statute no crime is being committed when someone uses an online will. But just because internet generated wills are not illegal does not mean they are any good. The biggest problem is that online will purchasers don't know what they don't know about wills. They see some fancy sounding language, language that says the wills were drafted by attorneys, and a cheap price tag, and think, "If this were a bad thing it would be illegal." Well my friends, that sort of logic often produces wills that fall far short of what most lawyers would consider standard.

The second sweep is about making sure that everything that most lawyers who do this for a living would agree is important to have in a will is in the will you are reviewing.

A. Important Provisions.

(1) Domicile

It is a good idea to include a declaration of where the testator is domiciled at the time their will is made. Knowing the domicile of the maker of a will is important for establishing whether the will was executed with proper formalities. In Texas and many other states, foreign wills may be valid, despite not meeting requirements in the state in question, if the will was validly created in a foreign jurisdiction.[63] Knowing where the maker is domiciled may be critical if you are reviewing the will of someone who just moved from another state or if the person whose will you are reviewing later moves to a foreign jurisdiction. For clients whose domicile is questionable, a statement in the will about their domicile also may help determine if personal property located in a state is subject to state death tax. While most states with a death tax will tax real property actually situated in their state, personal property often is only taxed if the decedent was domiciled in the state. A testator's statement about their domicile does not raise an irrefutable presumption, but it is a helpful piece of evidence when trying to establish the domicile of a person whose domicile is questionable.

(2) Statement Regarding Prior Wills or Codicils

When there are multiple wills and codicils things can get tricky. As discussed above, courts have gone to great lengths to read multiple validly executed wills of a testator in concert, where there is no statement regarding whether the later will added to or supplanted prior wills. [64] Therefore, it is a much cleaner for a will to state whether it is revoking all prior wills and codicils or supplementing and republishing a prior will.

(3) Identification of Key Players

Identifying the key players associated with a will is advantageous for multiple reasons. A best practice is to specifically name anyone who would be considered a natural object of the testator's bounty, even if all such individuals are not specifically beneficiaries under the will. The people who are the natural objects of the testator's bounty include the testator's spouse, children, and descendants of a predeceased child. If the testator does not have children, it is likely a good practice to name closest surviving kin such as parents and/or siblings.

Specifically naming family in a will tends to indicate that that the testator was of sound mind. If the testator identifies the natural objects of his bounty (regardless of whether those individuals are actually beneficiaries under the terms of the will), he is at least thinking about those who might take in the absence of a will. In addition, while the pretermitted child statute in Texas refers only to children born after a will is made,[65] the pretermitted child statute in some other states applies if a testator fails to mention or provide for a child (or the issue of a deceased child) alive at the time the will is executed. [66] Therefore, failing to mention the natural objects of a testator's bounty in a will can result in partial intestacy with respect to a child or the issue of a predeceased child who is omitted as a beneficiary under the will.[67]

(4) Naming an Independent Executor

In Texas, an independent executor serves with minimal court oversight and fewer probate responsibilities. Per Code § 401.001(a), a will may provide that "no other action shall be had in the probate court in relation to the settlement of the person's estate than probating and recording of the will and the return of any required inventory, appraisement, and list of claims of the person's estate." Including language tracking the statute is perhaps the most common way of creating an independent administration. However, case law has established that no magic words are necessary to create an independent

[62] Rader, James N., *Update on the Unauthorized Practice of Law: Do I Really Need a Law License to Practice Law?* State Bar of Texas Advanced Administrative Law Course (June 2015).

[63] *See* Tex. Est. Code § 251.053 (2015).

[64] *See Ayala v. Martinez*, 883 S.W.2d 883 (Tex. App.—Corpus Christi 1994, writ denied) (Court probated two wills of decedent and latter will controlled where the two wills were inconsistent on the same point).

[65] Tex. Est. Code § 255.051 (2015).

[66] *See e.g.*, Ark. Code Ann. § 28-97-407(b) (2015) (If, at the time of the execution of a will, there is a living child of the testator, or a living child or issue of a deceased child of the testator, whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child or issue).

[67] *See id.*

administration under § 401.001, and merely naming a person as "independent executor" is sufficient.[68] Without tracking the statute or otherwise providing an indication that an independent administration of the estate is intended, an independent administration may be created by the court if all of the distributees of the testator's estate agree that it is advisable to have an independent administration and the applicant includes a request for independent administration in the application.[69]

Face it, absent independent administration, probate is one big game of "mother may I?" Clients who have moved from another state may very well not have the concept of independent administration incorporated into their documents. Absent very narrow circumstances, it almost always behooves an attorney to suggest independent administration provisions be incorporated into a will. This is perhaps one of the most important checklist items for reviewing a will someone else drafted.

Practice pointer: Code § 401.001(a) was amended effective January 1, 2014. The former statute read: "Any person capable of making a will may provide in the person's will that no other action shall be had in the probate court in relation to the settlement of the person's estate than probating and recording of the will and the return of **an** inventory, appraisement, and list of claims of the person's estate" (emphasis added). The 2014 change to the statute was minor, almost imperceptible—it substituted the words "any required" inventory for "an" inventory. However, this slight change may be of significance. For years, drafters merely tracked the language of Code § 401.001(a) (and its Probate Code predecessor) in order to limit court action and create an independent administration. Code § 309.056 regarding the filing of an affidavit in lieu of inventory, appraisement, and list of claims added some variety to an executor's duties during an independent administration. Code § 309.056 was added to address privacy concerns associated with probate inventories, which had historically been public records open to public inspection. An affidavit in lieu of inventory may be filed with the court if all debts (other than secured debt, taxes and administration expenses) have been paid and the beneficiaries of the estate have received a copy of the inventory. This was a welcome change for many probate attorneys. However, it is not a secret that some judges did not like the affidavit in lieu of inventory and pressured attorneys to file an inventory with the court, even if all debts of the decedent were paid. Tracking the *former* wording of Code § 401.001(a) in a decedent's will may simply add fuel to those judges' fire, because it could be interpreted as *requiring* an executor to file an inventory, despite the fact that the Code now provides an alternative via § 309.056. Therefore, it may be worth checking whether the will you are dissecting directs the executor to file an inventory or gives the executor the option to file an affidavit in lieu of inventory.

(5) Successor Independent Executor

It is a good idea to name one or more successor independent executors in case the testator's first choice is not willing or able to serve. A person named as executor (or successor executor as the case may be) in the testator's will is given first priority to serve as executor under Code § 304.001, unless such individual is disqualified to serve as executor under Code § 304.003, because they are incapacitated, a felon, or a nonresident of the State of Texas (who has not appointed a resident agent to accept service of process which has filed the appointment with the court), a corporation not authorized to act as fiduciary in the State of Texas, or a person whom the court finds unsuitable. If successor executors are not named, priority for appointment of successor executors is as set forth in Code § 304.001(a)(2)-(a)(9). This sometimes involves classes of individuals, who may disagree on who should be appointed. The testator can circumvent disagreement by including a "lineup" of executors, to serve in a specified order.

(6) Co-Executors

The Code permits the appointment of Co-Executors.[70] The default rule is that co-executors may act independently and validly bind the estate with their individual actions.[71] The one exception to the general rule that co-executors may act independently is with respect to real estate. All co-executors must join in the conveyance of real estate unless the court authorizes fewer than all to act after due hearing.[72]

Texas case law has indicated that the maker of a will can specify that a certain number of executors is required to join in a decision, despite the default provisions of Code § 307.002.[73] It may be possible that the maker of the will might want all or certain actions to be approved by more than one co-executor. For example, the maker of a will might want all or a majority of the co-executors to join in the sale of a family business. Furthermore, if an even number of co-executors is appointed, the will should specify a procedure for breaking a deadlock if co-executors cannot reach an agreement on a decision.

[68] *In re Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.—Galveston 1951, no writ).
[69] Tex. Est. Code § 401.002 (2015.

[70] *See* Tex. Est. Code Ann. § 307.002 (2015).
[71] *Id.*
[72] *Id*.
[73] *See Becker v. Am. Nat'l Bank*, 286 S.W.889, 890-92 (Tex. Civ. App.—Austin 1926, no writ).

Finally, if co-executors are named, the will should specify what happens if one of the co-executors should decline to serve, resign, or fail to serve for any other reason. Code § 307.002(a) provides that if there is more than one executor and one executor "dies, resigns, or is removed…the estate shall proceed with the administration as if the death, resignation, or removal had not occurred." However, the statute does not specify what should happen if a named co-executor declines to serve before appointment. Should a named co-executor serve alone or should the next named individual serve? Is the testator's desire for co-executors person dependent (e.g., the Testator believes his wife should always serve with a co-executor, but if the wife declines to serve, his son may serve as sole executor) or does the testator want co-executors no matter what? The will should provide clear instructions to carry out the testator's intent.

(7) Executor Compensation

The default rule is that an executor is entitled to a five percent commission on all amounts the executor actually receives or pays out in cash in the administration of an estate.[74] The testator can override the statutory compensation regime by placing alternate compensation instructions in his or her will.[75] Applying the statutory formula for executor compensation can result in strange underpayments or overpayments to an executor. Therefore, most wills employ some other standard for executor compensation.

A common executor compensation provision in a will imposes a flexible reasonableness standard. Sometimes a compensation provision in a will states that executor compensation for an individual shall not exceed what a corporate fiduciary would receive. However, the maker of the will is free to specify any compensation amount he or she pleases. An executor who accepts appointment when a will specifies the amount of executor compensation may be foreclosed from arguing that the compensation stated in the will is inadequate based on the services they rendered.[76] As one court put it, "He could have refused to serve, but he chose otherwise. He made his bargain and he must abide it." [77]

When reviewing compensation provisions in a will, you should look for red flags that an individual who has never served as executor might not think through. First, it should be a red flag if you notice a small executor fee for certain individuals or corporations, especially when such executor is not a primary beneficiary of the estate. The maker should be reminded that there may be little incentive for someone who is not the primary beneficiary of the estate to serve without reasonable compensation standard. Why would they want to shoulder all the work and liability associated with the fiduciary position if they did not have the right to receive an amount at least equal (if not exceeding) the statutory rate? Another compensation issue may arise if co-executors are appointed. Case law has established the default rule that each co-executor is entitled to their pro rata share of the statutory compensation.[78] Such rule applies regardless of the amount of work actually performed by each co-executor, as long as each co-executor has performed some work.[79] If co-executors are to receive more than their pro rata share of the "five percent in and five percent out" rule established in Code § 352.002, then the will should specify that each co-executor is entitled to statutory compensation, not their pro rata share of statutory compensation.

(8) Waiver of Bond

Generally, the Code requires that an executor must post bond prior to appointment, unless the testator's will directs that the executor may serve without bond.[80] Specific language waiving bond is generally required in a will in order to waive a bond.[81] Appointing an independent executor or otherwise providing for minimal court action in a will is not adequate to dispose of the bond requirement.[82]

Obtaining a bond is not an insurmountable task, but it is a pain. Checking for the waiver of bond is definitely at the top of my list when reviewing a will someone else drafted. If the waiver of bond is not specifically provided for in a will you are reviewing, it is almost certainly time for an update.

(9) Power of Sale

Code § 356.002 states that an executor may sell estate property without a court order if the testator's will grants the executor the power of sale. Texas case law has indicated that if a testator does not include the

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[74] Tex. Est. Code § 352.002 (2015).

[75] *In re Estate of Roots*, 596 S.W.2d 240, 243 (Tex. App.—Amarillo, 1980, no writ); *Lipsteu v. Hagan*, 571 S.W.2d 36, 38 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

[76] *See Stanley v. Henderson*, 162 S.W.2d 95, 97 (Tex. 1942); *Allen v. Berrey*, 645 S.W.2d 550, 552 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

[77] *Stanley v. Henderson*, 162 S.W.2d 95, 97 (Tex. 1942).

[78] *Wright v. Wright*, 304 S.W.2d 951, 952-53 (Tex. Civ. App.—Amarillo 1957, writ ref'd) (holding that where three co-executors were named and the compensation for two the three executors was set in the will at $500 each, the remaining co-executor's compensation would be 1/3 of the statutory executor's compensation).

[79] *See id.*

[80] Tex. Est. Code § 305.101 (2015).

[81] *But see* Tex. Est. Code § 401.005 (2105).

[82] *In re Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.—Galveston 1951, no writ).

power of sale in in their will, independent executors may only be able to sell estate property if it is necessary to pay debts and expenses absent court approval.[83] There are many other circumstances that may make the power of sale beneficial other than to pay debts. For example, think about the client who had a lucrative contract to sell his business, but passed away before the deal was consummated. Not being granted the power of sale could prevent the executor of the testator's estate from selling the estate's interest. Another example of where the power of sale is beneficial is with respect to personal residences. The testator's 5 children may prefer to receive cash rather than a 20% undivided interest in a home that hasn't been updated since 1970. Therefore, it is a best practice to explicitly state that the executor has the power of sale.

(10) Guardian for Children

The Code permits the last the surviving parent of a minor child to designate by will (or other written declaration) a person to be the guardian of the person of any such minor child, unless the court finds such designee is disqualified, deceased, refuses to serve, or would not serve the minor's best interests.[84] An eligible person may also be entitled to be appointed guardian of the minor child's estate after the surviving parent dies or becomes incapacitated.[85] Code § 1104.054 provides a minor who is at least 12 years of age an opportunity to select his or her guardian if the court finds the selection is in the minor's best interest and approves the selection. It is not clear from the statute and case law whether the preference of a minor child who is 12 years or older or the preference of such child's surviving parent would take precedence in appointing a guardian if the selections conflicted.

Recall that there are statutory restrictions on the number of guardians that may be appointed for minor children. Generally, only one person is appointed as guardian of the person or estate of a minor child, but a different person may be appointed as guardian of the person than is appointed as guardian of the estate if that is in the minor's best interests.[86] However, co-guardians may be appointed to be guardians of the person and/or guardians of the estate of a minor, if such co-guardians are (1) husband and wife, (2) joint managing conservators, or (3) co-guardians appointed under the laws of another state.[87]

Selecting a guardian for any minor child the testator may have at the time of his or her death or incapacity is almost always a challenging task. If co-guardians are named in a will you should try to deduce whether they are married or make a note to ask the maker if it is anticipated that these individuals would be appointed as joint managing conservators of any minor children. After considering whether co-guardians are even feasible, evaluate whether the will has contemplated whether co-guardians named are only desirable as a team or whether they would also be desirable as individuals. What if one member of a married couple passed away or became disabled? Would the maker want the other named co-guardian to serve alone or not?

Practice Pointer: Code § 1104.053 allows the surviving parent of a minor by will or written declaration to name a guardian for a minor child either after the surviving parent dies *or* if the court finds the surviving parent is an incapacitated person. While reviewing a will for guardian provisions, check to see if the section is limited in application to a guardian(s) appointed if there is need after the testator's death. The statute allows a will to serve as evidence of a person's preferred guardian of a minor child in the event of the surviving parent's incapacity as well, but imprecise drafting could override the statutory provisions if the will specifically states that guardian appointments were only effective in the event of the testator's death.

(11) Personal Effects

Careful attention should be paid to bequests of tangible personal property. Words are important. Bequests of "personal belongings" and "personal property" where the will seems to imply personal effects or tangible personal property have created interpretation problems for courts.[88] A bequest of "personal property" may very well unintentional bequest of financial assets.

Another trap is a bequest of any item that holds other items (e.g., desk, chest, gun safe, etc.). The

[83] *See Smith v. Hodges*, 294 S.W.3d 774, 777 (Tex. App.—Eastland 2009, no pet.); *Buckner Orphans Home v. Maben*, 252 S.W.2d 726, 728 (Tex. Civ. App.—Eastland 1952, no writ). An example of this can be found in Ky. Rev. Stat. § 394.060, which states, "A devise or bequest extends to any real or personal estate over which the testator has any power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution to such power, unless a contrary intention appears in the will."

[84] Tex. Est. Code § 1104.053 (2015). There is also a procedure under Code § 1104.103 for the surviving parent of an adult incapacitated individual who is the court appointed guardian of such incapacitated person to designate by will or written declaration an eligible person to serve as guardian of the incapacitated adult after the parent dies or becomes incapacitated.

[85] *Id.*

[86] Tex. Est. Code § 1104.001(a) (2015).

[87] *Id.* at 1104.001(b)

[88] *See Dearman v. Dutschmann*, 739 S.W.2d 454, 455 (Tex. App.—Corpus Christi 1987, writ denied); *Goggans v. Simmons*, 319 S.W.2d 442, 445-46 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.).

default rule under the Code is that a bequest of personal property does not include the contents of the property unless the will specifies otherwise.[89] Likewise, the devise of real property does not include any personal property located on, or associated with the real property, unless the will directs otherwise.[90] If the maker of the will leaves his residence to his second wife, but all his tangible personal property to his children from a prior marriage, you can count on a fight. While personal effects that are not brand new tend to have less monetary value, they tend to have immense sentimental value for family members.

Another typical issue with a bequest of tangible personal property arises when it is gifted to a class of individuals (e.g., "my surviving issue, per stirpes"). While this answers the question of "to whom" such property should be distributed, it gives absolutely no instruction as to "how" such property should be divided up. Imagine the situation where the maker's will specifies property should be distributed to "my surviving issue, per stirpes," the family is fighting over who should get the maker's writing desk, and one of the family members laying claim to the desk is the sole independent executor. Consider whether the instruction that tangible personal property will be divided in the "sole and absolute discretion" of the independent executor will be sufficient or whether more specific instructions should be included (e.g., a bidding process, a lottery, etc.).

You should also consider whether you believe the description of a gift of tangible personal property is sufficient to identify the object of the bequest. A bequest of "my peal earrings" may create problems if it is discovered the testator had more than pair.

(12) <u>Real Property</u>

A specific devise of real property presents more unique problems. While a devise of a property by street address has been held sufficient,[91] in the past, a typo on the street address would have been fatal to the bequest. However, the addition of Code § 255.451 effective September 1, 2015 creates (for the first time) the opportunity for judicial modification of a will to correct a scrivener's error, such as correcting the incorrect address used in a will. Nonetheless, if a property is identified in a will by an address, the prudent attorney should be searching deed records or central appraisal district records online to ensure that such address is tied to the maker of the will.

Another issue to watch for when reviewing a devise of real property is a reference to "my" residence. This can create a latent ambiguity if the testator owns more than one residence. If you are aware the maker of a will owns more than one residence, it may be advisable to employ further descriptive wording, such as "my primary residence" "my Dallas residence." Furthermore, when describing real property consider whether it is appropriate to reference the residence in question, or any residence owned by the maker of the will at the time of his or her death. Without a specific reference to a residence owned at the time of the testator's death, it is possible a residence acquired after the date of the will could be excluded from a specific bequest.[92]

Every well-drafted will should give authorization for whatever steps are necessary to complete probate in a foreign jurisdiction. You never know when real property might be found out of state that will necessitate an ancillary probate for the estate.

Finally, your "Spidey-Sense" should be tingling when you see a devise of real property, but you do not see any specific direction about how mortgages (or other encumbrances) on the property are to be treated. Silence on the treatment of encumbrances is noteworthy, because different rules apply depending on when the will was executed. If the will was executed prior to September 1, 2005, then the beneficiary of a bequest subject to an encumbrance is entitled to have the debt paid out of the residuary estate. [93] If the will was executed on or after September 1, 2005, a specific devise passes to the devisee subject to each debt securing the property and the devisee is not entitled to exoneration of the debt from the testator's estate.[94] Given that the statutory rule is completely different depending on when someone executed a will, it is best that the testator's wishes are explicitly stated in a will.

(13) <u>Property to Minors</u>

Financial assets should never be given to minors outright. While there is no law on the books preventing a minor from owning real or personal property in the State of Texas, minors may void any contract they enter into based on their minority.[95] As such, financial institutions frequently refuse to contract with minors because they cannot limit their liability with minors through contract. Thus, while there is no *de jure* rule preventing a minor from receiving property directly from an estate, liability exposure for the executor and the refusal of some financial

[89] Tex. Est. Code § 255.003 (2015).

[90] Tex. Est. Code § 255.002 (2015).

[91] *See Baines v. Ray*, 251 S.W.2d 565, 567 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e).

[92] *See Wolf v. Hartmangruber*, 162 S.W.2d 112, 116 (Tex. Civ. App.—Fort Worth 1942, no writ).

[93] *See Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).

[94] Tex. Est. Code § 255.301 (2015); Tex. Est. Code § 255.304 (2015).

[95] *See Kargar v. Sorrentino*, 788 S.W.2d 189, 191 (Tex. App.—Houston [14th Dist.] 1990, no writ); but see Code § 1356.055 making certain contracts approved by a court in accordance with § 1235.051 not voidable by a minor).

institutions to transfer significant assets to a minor makes the prohibition on the transfer of property directly to a minor in a will a *de facto* rule. The maker of will should specify that property that would otherwise go outright to minors should be transferred to either: (1) the trustee of a trust for the benefit of such minor; or (2) a custodian, of an account administered in accordance with the Texas Uniform Transfers to Minors Act (or a similar law of some other state) for the benefit of the minor.

If the trust is a testamentary trust imbedded in the will, your work is far from over. Ensuring you have all the elements of a proper trust in your will is outside the scope of this paper,[96] but do check the will for some basic trust elements if a reference to a testamentary trust is made in the will such as trust terms embedded in the will, a distribution standard, end date for the trust, trustee lineup, references to the trust code, etc.

If a transfer to an UTMA account is a possibility, the will should contain a facility of payment clause that permits the executor to make distributions to the custodian of the UTMA account. This specific authorization is important. Without specific authorization in the will to distribute assets to an UTMA account, the maximum amount an executor could transfer to an UTMA account for the benefit of a minor beneficiary is $25,000.[97] If funds earmarked for a minor exceed $25,000 and there is no explicit authorization for an executor to transfer funds to the custodian of an UTMA account or a trustee of a trust for the benefit of a minor in a will, the executor may be left with no choice but to initiate (or encourage another to initiate) guardianship proceedings so that a guardian of the estate can be appointed to manage the minor's funds received from the estate. Therefore, make sure at minimum, a transfer to an UTMA account is authorized in the will. Even if the maker of the will does not have any minor children at the time they execute their will, unanticipated circumstances could cause a minor grandchild to become a beneficiary. Therefore, every will needs to have a facility of payment clause that would authorize an executor to distribute assets for the benefit of a minor to an authorized adult.

If the maker of a will anticipates that an UTMA account would be created for the benefit of a minor beneficiary, he should consider whether he would like to name a "lineup" of custodians in his will as permitted by Texas Property Code § 141.004, or whether he will rely on executor to designate a custodian for a minor beneficiary pursuant to Texas Property Code § 141.006(c).

(14) Charitable Beneficiaries

Charitable bequests seem harmless, but they are one of the most likely areas for mistakes in a will. The maker of a will is a lot more likely to know the legal name of their spouse than they are a charity, and a slight difference in a charity's name may matter. A $100,000 bequest to the ASPCA will inevitably cause problems. The ASPCA (a New York charity) and the SPCA of Texas will butt heads over which charity the gift was intended to benefit, and puppies and kitties could suffer. Therefore, if you see a charitable bequest in a will, think of the puppies and kitties and check to make sure the name listed in the will matches the charity's legal name using a combination of a web search for the charity, resources such as guidestar.com, and IRS Select Check (to verify tax exempt status of entity).[98]

While scrutinizing charitable bequests, check whether the will addresses what happens if the named charity no longer exists. A well-drafted charitable bequest addresses what the testator would want to happen in the event the charity changes names,[99] merges into a successor organization, or dissolves altogether. For example, the Community Foundation of North Texas changed its name to the North Texas Community Foundation at the end of 2015. Do charitable bequests to the Community Foundation of North Texas lapse because such an organization no longer exists? Make sure the will you are reviewing addresses the situation so the executor of the testator's estate is not faced with the decision of whether he should treat a charitable bequest to a non-existing charity as lapsing or whether he should seek a judicial modification to clarify the testator's intent.

(15) Powers of Appointment

Code § 255.351 specifies that a testator may not exercise a power of appointment through a residuary clause of his will unless the testator makes a specific reference to the power in the will or some other writing. This law codified the longstanding rule from the seminal Texas case concerning whether a power of appointment is exercised in a residuary clause of a will,

[96] For a thorough discussion of the types of provisions that should be present in a trust imbedded in a will, see Part 2, Article VII of Akers et. al, *The Anatomy of a Will: Practical Considerations in Will Drafting*, State Bar of Texas, Nuts & Bolts of Estate Planning and Probate, June 5, 2007 (available at: http://www.texasbarcle.com/materials/events/6358/110292_01.pdf).

[97] *See* Tex. Prop. Code § 141.007 (2015). This amount was raised from $10,000 to $25,000 effective September 1, 2015.

[98] Available at https://apps.irs.gov/app/eos/.

[99] For example, the Community Foundation of North Texas changed its name to the North Texas Community Foundation at the end of 2015. Do charitable bequests to the Community Foundation of North Texas lapse because such an organization no longer exist?

Republic Nat'l Bank of Dallas v. Fredericks.[100] In that case, the court stated: "The general rule is that in order for a will or deed to constitute the exercise of a power of appointment the intent to exercise such power must be so clear that no other reasonable intent can be imputed under the will. The will must refer to the power of appointment or to the property subject to such power, or the donee of the power must have owned no other property to which the will could have attached and thus the will have been a vain and useless thing except it be held to be an exercise of the power."

So in Texas you don't have to worry that someone will inadvertently exercise a power of appointment granted to them by virtue of having a residuary clause in their will which disposes of "all their property of whatever kind or character." In Texas, you have to make it clear you are exercising a power of appointment in order to do so in your will.

Nevertheless, the law is different in a minority of United States jurisdictions. Some states still have a statute on the books providing that a will disposing of all the testator's property will be deemed to exercise a testamentary power of appointment the testator possesses.[101] While the statutes may not specifically reference a will's residuary clause, it seems the residuary clause would be the place in which someone would inadvertently exercise a power of appointment. Therefore, not knowing where your testator's will might be probated, it is a best practice to state that the testator declines to exercise a power of appointment he or she may possess at the time of his death. What's more, it may be best to state such an intention before a residuary clause or clarify that the testator intends that the residuary clause should in no way be interpreted to exercise any powers of appointment the testator may possess at his death.

(16) Residuary Clause

An important part of the second sweep of the will is determining whether all probate property is disposed of by the will in all events. A good practice when reviewing a will someone else drafted is to chart out where the property goes from beginning to end. Who or what is the initial intended beneficiary of a bequest, who are the alternate beneficiaries (if applicable), and who is at the end of the line if all the named beneficiaries are not alive, disclaim, or are not eligible to receive the gift?

A residuary clause might come into play in a multitude of situations. For example, a named beneficiary may fail to survive the testator and the gift could lapse,[102] a condition precedent may not be met with respect to a conditional gift, or a bequest to a trust could revert back to the estate. For one reason or another, things might not go as planned.

When drafting a will, the enemy is intestacy. To avoid full or partial intestacy, generally, a residuary clause should leave the testator's assets to heirs-at-law or charity (as long as the provisions are carefully drafted to ensure that a charity will receive the assets even if the entity named no longer exists at the testator's death).

(17) Apportionment of Debts, Expenses, and Taxes

A decedent's estate vests immediately in his heirs, devisees, and beneficiaries.[103] However, any vesting of rights as an heir or beneficiary of a decedent's estate is subject to the non-exempt debts of the decedent.[104] One of the major functions of probate is to make sure the decedent's creditors get paid. The manner in which creditors' claims are satisfied varies based on either the terms or the silence of a decedent's will.

There are extensive provisions dedicated to payment of debts and expenses in the Code. Code § 355.102 deals with classification of claims,[105] Code § 355.103 deals with the priority of payment of debts and expenses, and claims,[106] Code § 355.108 deals with the prorated payment of claims within a class,[107] and § 355.109 deals with the abatement of bequests to pay for estate debts and expenses.[108]

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100 283 S.W.2d 39, 47 (Tex. 1955).

101 *See* Edward H. Rabin, *Blind Exercises of Powers of Appointment*, 51 Cornell L. Rev. 1, p. 9 (1965) available at: http://scholarship.law.cornell.edu/clr/vol51/iss1/1

102 If not saved by the anti-lapse statute. *See* Tex. Est. Code § 255.153 (2015).

103 Tex. Est. Code § 101.001(a) (2015).

104 Tex. Est. Code § 101.051 (2015).

105 Class 1 claims are funeral expenses and decedent's last illness expenses not to exceed $15,000 (excess is considered an unsecured claim), Class 2 claims are estate administration expenses, Class 3 claims are secured claims, Class 4 claims are child support claims, Class 5 claims are tax, penalties, and interest claims under Texas law, Class 6 claims are recovery for costs of confinement, Class 7 expenses are repayment for medical assistance, and Class 8 claims are all other claims.

106 Claims are to be paid in the following order: (1) decedent's funeral and last illness expenses, (2) family allowances, (3) administration expenses, (4) other claims in order of classification.

107 Claims in the same class are to be paid pro rata (other than secured claims which are subject to separate rules) when there are insufficient assets to pay all claims of the same class.

108 Bequests of property in a will abate (i.e., becomes liable to pay debts and expenses [other than estate taxes and secured claims for which the creditor has elected preferred debt and lien]), in the following order: (1) property not disposed of by will, but passing by intestacy; (2) personal property of the residuary estate; (3) real property of the residuary estate; (4) general bequests of personal property;

Apportionment of estate taxes is as directed by Code § 124.005. Generally, the executor's duty is to charge each beneficiary of the estate their share of the overall tax burden taking into consideration assets allocated to such beneficiary.[109] However, deductions, exemptions, and credits accruing to the benefit of certain beneficiaries are taken into consideration.

Let's be real for a second. If you ask a client to tell you their preference regarding abatement of bequests, you will see your client's best "deer in headlights" impression. So when might apportionment of debts, expenses, and taxes in a manner other than what the statute provides be warranted? The testator may want debts to be paid from a specific source (e.g., an account that was specifically bequeathed to someone) or may want gifts to particular individuals not to share in the payment of debts and expenses. The testator may be aware that certain assets will incur greater administration expenses than other assets and wish to allocate those administration expenses to the recipients of such asset. Alternatively, the testator may want all debts, expenses, and taxes be allocated to the residuary estate. Keep in mind, the maker reserves the right to change the rules with respect to the apportionment of debts, expenses, and taxes.

For the most part, the testator will have the opportunity to control who shares in the payment of debts, expenses, and taxes and how such payments are to be made. However, the maker does not have a great deal of control over what is actually paid. This will depend on the actions of creditors and the court. But one thing the testator can control is his direction to pay certain debts, expenses, and taxes. The prudent drafter will authorize payment of legitimate debts rather than direct the executor to pay all debts. Why is that? Some debts might be time barred or not presented to the executor. It's doubtful most people want their executor to pay debts that are not legally enforceable. Since the intent of the maker generally trumps statutory defaults, the words used in the will could force an executor to pay creditors that the executor would not otherwise be required to pay.

(18) Self-Proving Affidavit

This outline suggests that you peruse the self-proving affidavit on your first pass to see if all written indication points to the maker having testamentary capacity at the time the will was made. A will does not need to be self-proved to be valid. However, it will make life easier for the will proponent, the proponent's attorney, and the subscribing witnesses if the will is self-proved. That's why any good estate planning attorney will do whatever they can to ensure a will they draft is self-proved.

The legislature kindly provided examples of what a good self-proving affidavit should state in Code § 251.104 (See Exhibit C). Prior to September 1, 2011, the testator and witnesses would sign the will (witnesses would typically sign an attestation clause similar to the one attached as Exhibit B), but the testator and witnesses would essentially have to sign the will in two places in order to have a self-proved will. If the testator and witnesses sign the will only on a § 251.104 self-proving affidavit, the will would be considered signed but not self-proved.[110]

However, beginning on September 1, 2011, the maker of the will could avoid the so-called "Texas twostep" of signatures and attestation plus self-proving affidavit, and complete a one-step, simultaneous execution, attestation, and self-proving affidavit per Code § 251.1045 (See Exhibit D). Signing the single step form could lead to far fewer errors in executing a will. Many practitioners are set in their ways and continue with the Texas twostep.

The important thing is to make sure a will is self-proved in a manner set forth in either Code § 251.104 or Code § 251.1045.

B. Plan of Attack for the Second Pass

Whereas the first pass of a will should be short, sweet, to the point, and largely involve looking at the first page and the last two or three pages of the will, the second pass at a will generally takes more time.

Read through the second pass checklist before flipping to the first page of a will. The second pass will generally cause you to thumb through most, if not all, pages of a will. While the second pass checklist which is part of Exhibit A, follows the flow of many wills, there is definitely no guaranty that the will you are reviewing will employ the same flow (e.g., some wills identify key parties at the beginning, while others identify key players at the ends as part of a defined terms section), nor does the author of this paper suggest that the checklists attached hereto cover everything. But checking for second pass elements will help you identify common pitfalls that novice drafters (or internet-based programs) impose on the unassuming.

IV. THE THIRD SWEEP: CHECKING TO SEE IF YOU THINK THINGS WERE DRAFTED WELL

You should only make a third pass at a will if you are comfortable that you (1) have a valid will and (2) have a will that contains the most fundamental elements of any lawyer-prepared Texas will. If (1) or (2) are not met, there is a good chance you should

(5) general devises of real property; (6) specific bequests of personal property; and (7) specific bequests of real property.

[109] Tex. Est. Code § 124.005 (2015).

[110] *See* Tex. Est. Code § 251.105 (2015).

report back to the client that it is time to get a new will (or at least a codicil). But there is a good chance, that you set your goals for your clients higher than "it will do" (pun intended). The third pass at the will is to help you determine if you think the will is any good. You may find that fewer provisions on the third pass checklist are relevant to the will you are reviewing or aligned with your drafting style. That's okay. The third pass checklist is meant to get you thinking, not bog you down with technicalities.

A. Will Terms to Consider

(1) Changes to Disposition of Tangible Personal Property After Will is Made

Many next-level wills provide an opportunity to make bequests of tangible personal property via a holographic codicil or a memorandum that an executor might find instructive but not binding. Practitioners disagree about which method is better, but most practitioners agree that it is client-friendly to provide a mechanism for a client to direct how to dispose of their favorite pie plate or golf clubs without a lawyer's help.

(2) Avoiding Ademption

Without an express provision to the contrary, property specifically bequeathed in a will that is lost, stolen, or destroyed eliminates or "adeems" the bequest.[111] This often referred to as "ademption by extinction." When dealing with specific bequests, it is not clear cut what the testator would prefer if property bequeathed is not part of the Testator's estate at the time of his death.

One attempt to address the problem of ademption by extinction involves insurable property. Check to see if the will states that a bequest includes a gift of insurance proceeds that might be associated with such property if the property is lost, stolen, damaged, or destroyed. Absent a provision in a will to the contrary, a bequest of property, does not pass insurance associated with the property to the beneficiary.[112] While insurance proceeds may not be able to replace an item of sentimental value, bequeathing insurance proceeds to a beneficiary may help avoid unintended ademption by extinction for a bequest.[113]

Another option to head off ademption by extinction would be to address what happens if specifically bequeathed property is not owned by the testator at his or her death. The alternate language could provide a cash bequest (less any insurance proceeds allocated to the beneficiary per the will related to such property) be paid to the beneficiary or tie the alternate gift to an amount equal to actual sales proceeds for the property.

(3) Digital Assets

Another item of growing importance is provisions (or lack thereof) in wills that address digital assets. There is not yet a uniform definition for digital assets. However, old will conventions dividing personal property into tangible personal property and financial property don't seem to adequately address the complexities of digital assets. Digital assets may be financial in nature (e.g., bitcoin) or non-financial in nature (e.g., online picture album). Should both pass under the residuary clause? Are some digital assets more in the nature of personal effects? Should fiduciaries and beneficiaries have access to the content of emails, blogs, social media accounts, and online diaries of a decedent? So far, Texas has not adopted a law regarding digital assets. Attempts to enact the Uniform Fiduciary Assets to Digital Act were met with great opposition across the country. In 2015, the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADA) gained some traction, and as of May 1, 2016, 11 states have enacted RUFADA, and another 18 states have introduced a bill to adopt RUFADA.[114] In spite of the fact that Texas has not adopted RUFADA, you should strongly consider whether it is appropriate to address digital assets when reviewing a will someone else drafted.

(4) Divorce

They say fifty percent of marriages end in divorce, so there is a good chance you will review the will of someone who is divorced or who will get divorced sometime after you review their will. The Code attempts to address the fact that sometimes people die after a divorce without updating their will by providing that if, after a testator makes a will, the testator's marriage is dissolved, all provisions in the will including fiduciary appointment shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator had failed to survive the testator, unless the will expressly states otherwise.[115]

Rare is the testator who wants to include their former spouse in their estate plan. However, these creatures do exist. On more than one occasion, I have had a divorced person deliberately include a former

[111] *Shriner's Hospital v. Stahl*, 610 S.W.2d 147, 150 (Tex. 1980).

[112] *See Springfield Fire & Marine v. Boon*, 194 S.W. 1006 (Tex. Civ. App.—Texarkana 1917, writ ref'd). The foregoing case is often cited as authority for this proposition, however it involved an inter vivos transfer, not a testamentary transfer.

[113] *See Shriner's Hospital*, 610 S.W.2d at 150.

[114] See Uniform Law Commission online http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015).

[115] Tex. Est. Code § 123.001 (2015).

spouse in fiduciary appointments and bequests. However, more often than not, divorced individuals do not want their exes to derive any power or benefit from their estate. While Code § 123.001 can be helpful if a will is silent, it may be advisable to include provisions addressing divorce in any will that is drafted. "Won't the statute save my client you might ask?" Perhaps. But it is not difficult to think of a scenario where the statute would not bail out the testator. Take for instance, a testator who divorces after he has made a will leaving everything to his former wife. After hearing there is a statute that protects people if they get divorced after a will is made, he executes a holographic codicil stating that his son is to receive his golf clubs at his death. He does not want to pay a lawyer for a change as small as that. The testator has now republished his former will by codicil and so his former wife will not be treated as if she predeceased him.[116] She may very well be entitled to be appointed executor and be entitled to all his property. Therefore, despite the fact that Code § 123.001 provides protection against a former spouse meddling in estate administration, it may be safest if wills address how a former spouse of the testator is to be treated.

(5) Resignation or Declination to Serve of an Appointed Executor

Once appointed, an executor may resign upon written application to the court, citation, hearing, a delivery of a final account of estate property, delivery of estate property, and court approval.[117] This is a rather extensive list of tasks associated with resignation. It is unclear from the statute and the dearth of case law whether the maker of a will could require an executor jump through fewer hoops in order to resign by including a less intensive resignation procedure in the terms of his will. Even if a will provided for less stringent procedures for an executor's resignation, it is likely that court approval of the resignation of the executor and appointment of a successor executor would be necessary if continued estate administration is required. Some practitioners include provisions for a simplified resignation process for a will, in hopes that an easier process is possible.

Similarly, it may be advisable to include in a will a mechanism for a person to decline to serve as executor. Anecdotally, courts have been willing to accept a notarized document from an individual declining to serve. Things tend to be trickier if a person appointed as executor is alive but incapacitated and cannot sign a declination to serve. Courts have typically been willing to accept an attending physician's signed statement that the appointed individual is incapacitated, but families are often hesitant to or put off by approaching a doctor and asking the doctor to swear to such a statement. Consider whether it may be a good idea to incorporate a provision into a will allowing an agent under a power of attorney to submit an acknowledged statement in which he or she may exercise the principal's right to decline to serve as executor. This may save headaches for families dealing with incapacity issues.

(6) Conditioning Gifts on Survival

Another item to look for in determining whether you think the will you are looking at passes muster is the language used for specific bequests. A specific bequest may simple say, "I give $10,000 to Jerry Jones at my death," but the Code provides many more parameters for the bequest.

Recall, that a devisee must survive the testator by 120 hours or they are treated to have predeceased the testator without instructions in the will changing this rule.[118] Furthermore, if a devise fails because a specified beneficiary does not survive the testator, the devise will lapse and become part of the residuary estate (the "lapse" rule).[119] However, if the deceased devisee is a descendant of one of the testator's parents, the descendants of the devisee who survive the testator by 120 hours take the devised property in place of the devisee (the "anti-lapse" rule).[120] However, the anti-lapse rule does not apply if the devise is explicitly conditioned upon the devisee surviving the testator (e.g., "to Jerry Jones if he survives me").[121]

In effect, this means that the words "I give $10,000 to Jerry Jones" really mean "I give $10,000 to Jerry Jones if he survives me by 120 hours. If he does not survive me by 120 hours, then the gift lapses and passes as part of my residuary estate, unless Jerry is a descendant of one my parents, in which case, the $10,000 shall be split among Jerry Jones's descendants who survive me by 120 hours on a per stirpes basis." That's a mouthful. Instead of relying on statutes that clients likely do not understand, it may be a best practice to circumvent the anti-lapse statute altogether and state that each specific bequest is conditioned on survival. If the devisee does not survive, the will should either state the alternate taker(s) the testator wishes to receive the bequest, or state the intention that the bequest lapses (e.g., "I bequeath $10,000 to Jerry Jones if he survives me, or if Jerry Jones doesn't survive me, I give such $10,000 bequest to his son Stephen Jones" or "I bequeath $10,000 to Jerry Jones if he survives me. If Jerry Jones does not survive me this

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[116] Per *Laborde v. First State Bank & Trust Co.*, 101 S.W.2d 389 (Tex. Civ. App. —San Antonio 1936, writ ref'd), a will "speaks" from the date of the codicil.
[117] Tex. Est. Code § 361.001 (2015).
[118] Tex. Est. Code § 121.101 (2015).
[119] *See* Tex. Est. Code § 255.152 (2015).
[120] Tex. Est. Code § 255.153 (2015).
[121] Tex. Est. Code § 255.151 (2015).

gift shall lapse and pass as part of my residuary estate.") This way the testator can be sure that the people he wants will benefit from specific bequests.

(7) Executor's Powers

An executor's powers under the Estates Code apply in absence of language in the testator's will to the contrary. Expansion or abrogation of an executor's powers must be specifically stated in the will. One short form way to expand an executor's powers without a significant addition to the length of the will is to incorporate by reference the powers granted to a trustee under the Texas Trust Code (or any successor statues thereto). This can provide the executor additional powers and discretion that may be desirable (e.g., the power to delegate functions among co-trustees from Texas Property Code § 113.085 could be a valuable tool when multiple executors are appointed).

Practitioners disagree about whether it is best to incorporate the Texas Trust Code as in effect at the time the will is executed to give the testator more certainty on the powers which they are bestowing upon an executor, or whether it would be better to give executors the powers of trustees under the Texas Trust Code in effect at the time the Executor is discharging his fiduciary duties.

(8) Definitions

Many well drafted wills employ a definitions section to tailor definitions that could have multiple meanings.

a) Child or Children

The definition of the terms "child" and "children" is becoming more complicated than it has been in the past. To avoid the applicability of the pretermitted child statute, contemplate whether the term includes children born to the testator after the will is made. The will should address whether step-children are to be considered to be the "children" of the testator.

Furthermore, in this day and age, the will should address posthumous children given advances in assisted reproduction. Without specific instructions addressing whether a child should be considered a child of the decedent, Texas Family Code § 160.702 states a donor is not a parent of a child considered by means of assisted reproduction. However, if a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of any children resulting from the use of his or her genetic material unless the deceased spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after death the deceased spouse would be the parent of the child.[122] But what if the testator provides specific instructions that any posthumous child shall be considered a child of the decedent? Does this now circumvent the rule in Texas Family Code § 160.702 so that any of the testator's genetic material, whether donated or maintained by a person known to the testator, could result in a posthumous child who could be a taker under the testator's will?[123] It may further the testator's intent that any child born with the testator's genetic material should be considered his or her child. However, the testator may prefer that the definition of his or her "children" be limited to prevent strange outcomes given that Pandora's Box has been opened by assisted reproduction.[124]

b) Adopted

In Texas, both minors and adults may be adopted.[125] There are legitimate reasons for adult adoption, such as formal unification of a blended family. But on the flip side, avarice sometimes seems to be an apparent motive for adult adoption when the distribution of a family fortune is at stake.[126] If a will is silent on the matter an adopted child will be considered the child of his or her adoptive parents for all purposes and can inherit both from and through his or her adopted parents.[127] To avoid strange results that could occur in the future, many drafters choose to state that for purposes of his or her will, the term "child" or "children" will include those adopted by a person prior to age 18 or some earlier age.

c) Descendants or Issue

The terms "descendants" or "issue" are frequently used to describe those that descend from the testator's

[122] Tex. Fam. Code § 160.707 (2015).

[123] *See* Wolfish, Lawrence M., *The Origin of Life: Who is a Descendant? Opening a Can of Wombs Inherited Rights of Children Conceived After the Death of a Parent,* Dallas Bar Association Probate, Trusts & Estates Section (Mar. 22, 2010) available at: http://www.dallasbar.org/sites/default/files/wolfish_descendants-speech_0.pdf.

[124] For an example of just how far things have gone see the ABA Journal's article detailing that an Austin probate court ordered a medical examiner to maintain a decedent's body following his death and grant access to his sperm so that his mother could arrange a posthumous pregnancy with the help of a surrogate. "Texas Judge Tells Medical Examiner to Help Mom Get Dead Son's Sperm" (April 8, 2009) available at http://www.abajournal.com/mobile/article/sperm.

[125] Tex. Fam. Code § 162.001 (2015); Tex. Fam. Code § 162.507 (2015).

[126] *See In re Ellison Grandchildren Trust,* 261 S.W.3d 111, 129 (Tex. App.—San Antonio 2008, pet. denied) ("I cannot conclude that Ray Ellison Sr. intended to preclude adult adoptees as "descendants" of his son, Ray Ellison, Jr…The record reflects that the Linder boys were adopted by Ray Jr., in part, to allow Ray Jr. to exercise control over his father's trust. Although the Lindner boys do not look like worthy beneficiaries, I would not change twenty-five years of law to refute their claims.)

[127] Tex. Fam. Code § 162.507 (2015).

children. But wording sometimes varies in defining these terms. You should review these definitions in a will to ensure the right class of individuals is encompassed. In a will where the term "descendants" is defined as "my children and my children's children" great-grandchildren could inadvertently be cut out of a bequest.

d) Per Stirpes

The term "per stirpes" is tossed around casually in wills. It is extremely important to define this term, because different definitions can result in different divisions of property. Texas follows a "per capita with representation" rule for intestate distributions. This means that property is divided in equal shares in the first generation in which there are living takers.

Example 1: If the testator dies with one living child and one predeceased child who has two living children, the per capita with representation rules would result in ½ the estate to the living child and ¼ to each of the grandchildren by the testator's deceased child.

Example 2: If the testator dies and had a predeceased child, who has one surviving child, and another predeceased child, who has two surviving children, a per capita with representation distribution would result in each grandchild receive a 1/3 share of the estate.

However, with a strict definition of per stirpes, Example 2 above might result in one grandchild receiving ½ have of the estate and the other two grandchildren receiving ¼ of the estate each. Because states differ on their interpretation of the term "per stirpes" a definition should be included that states the testator's preferences. An example to demonstrate the definition may also be helpful.

B. Plan of Attack

The third pass at a will is all about determining if you believe the instrument is a good fit for the maker of the will based on what you know. It may be a valid will, it may even be better than an online will, but is it something you can recommend based on your vast experience as an estate planning attorney? This pass is about nitpicking. What would you do better than the drafter? Are the items you nitpick about significant enough for you to recommend the person make a new will?

V. SPECIAL CONSIDERATIONS FOR HIGH NET-WORTH TESTATORS

A. Pourover Wills

Special considerations for high net-worth testators are beyond the scope of this outline. However, a couple of items should be on your checklist with respect to testators who you think will have larger estates.

One consideration is whether the will is a pourover will. Code § 254.001 permits a testator to devise property to the trustee of a trust. Unless the testator's will provides otherwise, property devised to a trust in a will is deemed as devised to the trust with any amendments to the trust made before or after the trustor's death.[128] Furthermore, unless the will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse.[129] If you are reviewing a pourover will, it is important to establish what would happen if the trust that the will pours assets into at the testator's death was not in existence. Is there a residuary clause as a backup? Alternatively, are the terms of the trust agreement for the intended recipient trust integrated[130] or incorporated by reference into the will?[131] A backup is necessary in order to avoid intestacy if the trust that is intended to be the recipient of a pourover gift from a will is not in existence at the time of the testator's death.

B. Formula Pecuniary Bequests

It is a common practice for married testators with large estates to employ a pecuniary bequest in order to efficiently use their remaining estate tax exemption amount and remaining generation-skipping transfer (GST) tax amount and avoid estate tax at the first spouse's death. A pecuniary bequest is a bequest of cash or property with a specific dollar value. The testator's Applicable Exclusion Amount is sent to a "bypass"/"credit shelter" trust and any remainder is distributed to a marital trust which is eligible for the QTIP election or outright to the testator's spouse. Where GST exemption preservation is a goal, trusts may be further divided. If the testator's remaining GST exemption is greater than the amount allocated to the bypass trust, then the marital trust might be divided into a GST exempt marital trust and a GST non-exempt marital trust. However, if the testator's remaining GST

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[128] Tex. Est. Code § 254.001(c) (2015).

[129] *Id.* at § 254.001(d).

[130] Under the doctrine of integration, various writings may be included as part of the will if such instruments were present in the room at the time of the execution. *See Adams v. Maris*, 213 S.W. 622 (Tex. Comm'n App. 1919, no writ); Akers et. al, *The Anatomy of a Will: Practical Considerations in Will Drafting*, p. 38, State Bar of Texas, Nuts & Bolts of Estate Planning and Probate, June 5, 2007, available at: http://www.texasbarcle.com/materials/events/6358/110292_01.pdf.

[131] Under the doctrine of incorporation by reference, an extrinsic document not present when the will was executed may be incorporated into the terms of the will if the document is in existence when the will is executed, the will shows an intent to incorporate the document's terms, and the extrinsic writing is clearly identified. *Allday v. Cage*, 148 S.W.838, 839 (Tex. Civ. App. 1912, writ ref'd).

exemption is less than the amount allocated to the bypass trust, then the bypass trust might be divided into a GST exempt bypass trust and a GST non-exempt bypass trust.

At this point, you probably know these rules like the back of your hand. Selecting whether the marital trust or the bypass trust should be the object of a pecuniary bequest and which should be the object of a residuary bequest may matter from an income tax perspective if the will specifies that bequests will be funded using date of distribution values.[132]

If the executor elects to fund a pecuniary bequest with appreciated property using date of distribution values, this is treated as a sale and the estate realizes gain in an amount equal to difference in value of the assets used to fund the bequest between the testator's date of death and the funding of the bequest.[133]

So as a reviewer of a will someone else drafted, what does this mean for you? First, you should be able to identify what kind of pecuniary bequest you are dealing with: which trust (or individual) is the recipient of the pecuniary amount and which trust (or individual) is the recipient of the residuary amount. A pecuniary bypass typically involves less convoluted drafting. The language will leave the testator's remaining applicable exclusion amount to a bypass trust. A pecuniary marital deduction tends to be a little wordier. Although by its very nature a pecuniary bequest is a specific property or dollar amount, you will have no idea how much a pecuniary marital bequest is after reading the bequest language. In essence, the testator will allocate to the marital trust the smallest amount possible that will result in no estate tax being due at his death.

After you have identified whether the will contains a pecuniary bypass bequest or a pecuniary marital deduction bequest, the next task is to evaluate whether you think the right trust (or individual) is the recipient of the pecuniary bequest and the residuary bequest. Your analysis will be easiest if you know the general size of the testator's estate and if you know if the assets of the testator's estate are likely to increase or decrease in value. While the analysis can be very complex, a general rule of thumb is that in an appreciating estate, the smaller valued trust should be the recipient of the pecuniary bequest and the larger valued trust should be the recipient of the residuary estate. Why is that? If the estate is appreciating, there is less risk of triggering gain by funding the pecuniary bequest with appreciated assets—funding the smaller trust first will generally cause you to trigger less gain. If the assets of the estate are likely to decrease in value, the general rule is flipped on its head.

In order to truly pick the proper pecuniary bypass bequest you would have to have a crystal ball that would tell you the size the testator's estate at his death, and whether estate assets will appreciate or depreciate between the testator's death and funding of the bequests. However, just because you cannot predict the future does not mean you should attempt to decipher whether a pecuniary bypass bequest seems to match your expectations about the estate assets and their potential to generate gain upon funding.

Finally, after the proper pecuniary bequest is identified, you should consider the manner in which the pecuniary bequest will be funded. An estate must be funded in one of the methods approved in Revenue Procedure 64-19 (e.g., cash funding, date of distribution funding, minimum net worth funding, fairly representative funding, or fractional share of estate funding), or the estate may be denied the benefit of the marital deduction.

Prior to Revenue Procedure 64-19, taxpayers' wills frequently would include a pecuniary marital bequest and state that it would be funded using date of death values. After the married testator died, the executor would fund the marital trust with property that had depreciated in value since the testator's death leading to the strange result that the testator's estate took a marital deduction in an amount greater than what actually was put into the marital trust.[134] The Internal Revenue Service put the kibosh on this practice.

VI. CONCLUSION

Doctors do not get to perform pre-mortem autopsies. In contrast, estate planning attorneys frequently have the unique opportunity to examine the guts of a will before the testator flatlines. Seize the opportunity to review a will someone else drafted with

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[133] Treas. Reg. § 1.1014-4(a)(3).

[134] Henkel, Kathryn G., *Estate Planning and Wealth Preservation Strategies and Solutions* § 49.02[2][a] (2011).

vigor and with a plan. Check for significant problems related to validity of a will before you spend time in the weeds critiquing provisions in a will reasonable lawyers handle in different ways.

EXHIBIT A
Checklist for Reviewing a Will Someone Else Drafted

First Pass: Do You Have a Will?

Y	N	N/A	*	
				Is the maker's name printed legibly anywhere on the document?
				Is the document signed by the maker?
				Is there a statement in the will that the testator is at least 18 years of age (or otherwise meets the status test)?
				Is the document signed by two witnesses?
				Are the witnesses' names printed legibly anywhere?*
				Is there an attestation clause or some other way of proving witness attestation, credibility, and that they are least 14 years of age?
				Is there any indication that this will has been revoked or superseded?
				• Is there a statement that the document supersedes prior wills?
				• Is there any statement that tends to indicate that the document should be read in conjunction with another document (e.g., prior will or codicil)?
				Does the document contain any language tending to indicate testamentary intent (e.g., "this is my last will and testament")?
				Does the document contain language tending to prove the testator was of sound mind (e.g., in self-proving affidavit)?

Second Pass: Things Any Estate Planning Attorney Worth Their Salt Would Include in a Will

Y	N	N/A	*	
				Is the domicile of maker stated?
				Identification of family:
				• Does the will identify whether the maker is married?
				• If married, does the will state the name of the maker's spouse?
				• Does the will name all natural born and adopted children even if they are not beneficiaries?
				• Does the will name all step-children and discuss their status as beneficiaries (or not)?
				• Does it address children born after the will was made?
				Does the will specifically appoint an INDEPENDENT executor?
				Does the will state that no action will be required in court other than probate of will and filing an inventory or an affidavit in lieu thereof as provided by law?

Second Pass (cont.)

Y	N	N/A	*	
				Does the will appoint successor independent executors?
				If co-executors are named, does the will address what happens if one cannot serve (e.g., does the next successor serve as co or should the remaining serve alone)?
				Does the will address how co-executors are to act (independently or together) and what happens if they disagree on an action?
				Has executor compensation been addressed specifically?
				Does the will waive bond for any executor?
				Does the will give the executor the power of sale for property owned by the estate?
				Does the will appoint a guardian for any minor children if there is a necessity?
				If co-guardians are named:
				• Are they spouses, anticipated to be joint managing conservators, or co-guardians under the laws of another state?
				• Has the will addressed the maker's preference if one, but not the other, co-guardian is able to serve?
				Does the will dispose of personal effects?
				• Does it provide a reasonable method for the executor to distribute among multiple beneficiaries?
				• Does the description of specifically bequeathed tangible personal property seem sufficient to identify the property?
				Does the will specifically identify real property to be devised and have you verified the testator's ownership of that property?
				Does the will address whether encumbered property passes subject to the encumbrance?
				Does the will authorize the appointment of ancillary executor?
				Does the will provide for contingent trusts for minors (or otherwise disabled beneficiaries) or payment to an UTMA account f/b/o minors?
				• Are the terms of a contingent trust imbedded in the will?
				• Are there trustee and successor trustee provisions?
				• For UTMA: is there a facility of payment clause that would allow for a transfer to an UTMA account for an amount exceeding $25,000 per Texas Property Code § 141.007?
				• Is there a custodian and alternate custodian named for any UTMA accounts or authorization for the executor to appoint a custodian?
				Charitable beneficiaries:
				• Have you verified the existence of charitable beneficiaries named? Is that the right name?
				• Does the will address what happens to the bequest if the charity changes names, distributes assets to a successor organization, or isn't tax exempt?

Second Pass (cont.)

Y	N	N/A	*	
				Does the will address powers of appointment, and decline to exercise powers which are not specifically mentioned?
				Does the will dispose of all property (i.e., does it have an adequate residuary clause ultimately ending up with heirs or permanent institution to avoid intestacy)?
				Is there a provision for apportionment of debts, expenses, and taxes?
				Does the will authorize, instead of require, the payment of debts (i.e., avoid payment of nonenforceable debts)?
				Does the will contain a self-proving affidavit (Estates Code § 251.104) and attestation clause ("Texas Two Step") or a Simultaneous Execution, Attestation, and Self-Proving Affidavit (Estates Code § 251.1045)?

Third Pass: Things Estate Planners Differ On (a/k/a Do You Think What is Done is Done Well?)

Y	N	N/A	*	
				Does the will authorize a separate memorandum to dispose of personal effects?
				Does the will address what maker would want to happen in the event of the sale of specifically bequeathed property to avoid the ademption by extinction rule?
				Does the will include the bequest of applicable insurance proceeds associated with bequests?
				Does the will address the disposition of digital assets (financial and non-financial in nature)?
				Does the will address whether fiduciaries or beneficiaries should have access to the testator's electronic accounts (e.g., bank accounts, email accounts, blogs, etc.)?
				Does the will address divorce of testator and beneficiaries of the will?
				Is there a procedure for resignation of an executor?
				Is there a procedure for an executor to decline to serve if that person is alive but doesn't have capacity?
				Does the will condition specific bequests on survival to avoid application of lapse/anti-lapse rule?
				Does the will carefully consider expanding the executor's powers?
				• Incorporate Trust Code powers related to trustees to executors?
				• Give discretion to make tax elections and exonerate them from exercising their discretion in making elections?
				• Does it direct the executor to make AND pay for the portability election? Would either of those requirements be desirable (e.g., second marriage where children and step-mom don't get along)?
				• Have investment powers been expanded beyond statutory requirements?

Third Pass (cont.)

Y	N	N/A	*	
				Does the will define key terms?
				• Children- are posthumous children addressed?
				• Descendants or issue
				• Adopted—only if legally is adopted at a certain age (e.g., 18)?
				• Per stirpes/per capita
				Does the will state headings are not substantive terms?
				Does the will list all headings sequentially? Is the use of section/article consistent?
				Are all cross-references in the will correct?
				Does the will contain a no contest clause, if relevant?

Special Considerations for High Net-Worth Clients

Y	N	N/A	*	
				Pourover Wills:
				• Does the will incorporate the terms of a trust to which it is pouring over by reference? Are the terms of the recipient trust as amended or as of the date of the will?
				• Does the primary residence go outright to the surviving spouse? Should it?
				Pecuniary Legacies:
				• Does a pecuniary legacy seem appropriate based on what you know about the size and makeup of the maker's estate?
				• Was there a pecuniary bequest of a specific exemption amount to a bypass trust?
				o If so, does that amount seem reasonably tied to an exemption or an amount deliberately selected by the maker
				o Does a pecuniary bypass bequest seem tax efficient as opposed to a marital deduction bequest?
				• Was there a marital deduction bequest?
				o Does a marital deduction bequest seem tax efficient as opposed a specific exemption bequest?
				o Has marital deduction bequest taken into consideration all relevant deductions to the estate (other than the marital deduction) credits to the estate (including, but not limited to unified credit/applicable credit amount, credit for state death taxes provided by IRS § 2011 (if applicable), and any credit or reduction), and all other facts relevant to computing estate tax to extent they increase death taxes?

Special Considerations for High Net-Worth Clients (cont.)

Y	N	N/A	*	
				o Does it direct that only assets qualifying for the marital deduction may be allocated to the marital deduction bequest
				o Is there a reference to and attempt to comply with Revenue Procedure 64-19?

EXHIBIT B

ATTESTATION CLAUSE

The Testator whose name appears above declared to us, the undersigned, that the foregoing instrument was [his/her] Last Will and Testament, and [he/she] requested us to act as witnesses to such instrument and to [his/her] signature thereon. The Testator thereupon signed such instrument in our presence. At the Testator's request, the undersigned then subscribed our names to the instrument in our own handwriting in the presence of the Testator. The undersigned hereby declare, in the presence of each of us, that we believe the Testator to be of sound and disposing mind and memory.

Signed by us on the same day and year as this Last Will and Testament was signed by the Testator.

______________________________	______________________________
Witness	Address
______________________________	______________________________
Witness's Printed Name	

______________________________	______________________________
Witness	Address
______________________________	______________________________
Witness's Printed Name	

EXHIBIT C

Texas Estates Code § 251.104 Self Proving Affidavit

THE STATE OF TEXAS

COUNTY OF ________________

Before me, the undersigned authority, on this day personally appeared _______________, _______________, and _______________, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said _______________, testator, declared to me and to the said witnesses in my presence that said instrument is [his/her] last will and testament, and that [he/she] had willingly made and executed it as [his/her] free act and deed; and the said witnesses, each on [his/her] oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is [his/her] last will and testament, and that [he/she] executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at [his/her] request; that [he/she] was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States, or an auxiliary of the armed forces of the United States, or the United States Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

____
Testator

____
Witness

____
Witness

Subscribed and sworn to before me by the said ____________, testator, and by the said ________________ and _______________, witnesses, this ______ day of ________________ A.D. ________________.

(SEAL)

(Signed)_____________________

(Official Capacity of Officer)

EXHIBIT D

Texas Estates Code § 251.1045

Simultaneous Execution, Attestation, and Self-Proving Affidavit

I, ______________________, as testator, after being duly sworn, declare to the undersigned witnesses and to the undersigned authority that this instrument is my will, that I willingly make and execute it in the presence of the undersigned witnesses, all of whom are present at the same time, as my free act and deed, and that I request each of the undersigned witnesses to sign this will in my presence and in the presence of each other. I now sign this will in the presence of the attesting witnesses and the undersigned authority on this ______ day of __________, 20________________.

____

Testator

The undersigned, __________ and __________, each being at least fourteen years of age, after being duly sworn, declare to the testator and to the undersigned authority that the testator declared to us that this instrument is the testator's will and that the testator requested us to act as witnesses to the testator's will and signature. The testator then signed this will in our presence, all of us being present at the same time. The testator is eighteen years of age or over (or being under such age, is or has been lawfully married, or is a member of the armed forces of the United States or of an auxiliary of the armed forces of the United States or of the United States Maritime Service), and we believe the testator to be of sound mind. We now sign our names as attesting witnesses in the presence of the testator, each other, and the undersigned authority on this __________ day of __________, 20______________.

____

Witness

____

Witness

Subscribed and sworn to before me by the said _________, testator, and by the said _____________ and ______________, witnesses, this _____ day of __________, 20____________.

(SEAL)

(Signed)_____________________

(Official Capacity of Officer)