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Trusts and Estates

While Inadvisable—Emergency DIY Wills Can Work

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In our last article, we mentioned that the project of getting around to signing a will is generally met with moderate to extreme procrastination. Many times people think about their wills right before embarking on a vacation—worrying about the plane going down. Like all things in life, though, it's better when the terms of a will are thought out in advance and not in a last-minute scramble. In the case of one's will, it is advisable to have a lawyer prepare it since a do-it-yourself will can easily lead to more problems than it solves. However, there may be circumstances when there is no time to go through the traditional process of having a will prepared (or formally updated by a codicil), and when the only option available is that cocktail napkin at the airport bar while awaiting one's flight. Courts have certainly been known to rule that a signed writing on a napkin can be an enforceable contract, but what about a will? In this article, we will examine the execution "formalities" which are required to have a valid will in Pennsylvania and New Jersey.

• Voluntary, sound mind and age 18.

In both Pennsylvania and New Jersey (and undoubtedly every other jurisdiction), the person who makes a will, known as a "testator" or "testatrix," must sign it voluntarily (i.e., not under duress or undue influence), must be of sound mind and must be at least 18 years of age. There is not a very high bar to being of sound mind for purposes of executing a will, since under applicable law it takes less capacity to make a will than to consummate nearly any other legal act. For testamentary capacity, the testator must know the nature of the act, the objects of his bounty, the nature and extent of his property and comprehend the disposition of the assets addressed by the will.

• In writing.

In both Pennsylvania and New Jersey, wills must be in writing. Oral wills are not permitted.

• Signature.

Pennsylvania requires that a testator signs the will at the end of the document. New Jersey also requires the testator's signature, although there doesn't appear to be a requirement in the New Jersey statute that the signature be at the end. If a testator is unable to sign, both states allow the signature to be of another individual in the testator's presence and at the testator's direction. Pennsylvania also allows a testator to sign by mark.

• Witness requirements.

- No Required Witnesses in Pennsylvania.

In Pennsylvania, witnesses are not required at the time that the will is executed, unless the testator signed by mark or where someone else signs at the testator's direction (in such cases two witnesses are required). If witnesses were not available at the time of signing, they will later be required at the time of probating the will, as described later in this article. Even though witnesses are not required, it is both customary and advisable to have two witnesses sign a Will in Pennsylvania, and if possible, in the presence of a notary using a "self-proving affidavit" (as further discussed below).

- Two required witnesses in New Jersey.

In New Jersey, the will must be signed by at least two witnesses, each of whom signed within a reasonable time after each witnessed either the signing of the Will or the testator's acknowledgment of that signature or acknowledgment of the will.

- **Interested Witnesses.**

In both Pennsylvania and New Jersey, having an "interested" witness (i.e., a witness who inherits under the will) will not invalidate a will. However, it is generally advisable to have disinterested witnesses sign, if possible, particularly in situations where a will contest is likely or if there is suspicion of undue influence or duress.

• Holographic wills (no witnesses required).

Wills that are completed in the handwriting of the testator without any witness signatures are known as "holographic wills." Not all states recognize holographic wills. Pennsylvania makes no legal distinction between a handwritten Will and a typed Will. This makes sense, given that in Pennsylvania Wills are not required to be witnessed and only are required to be signed at the end by the testator. In New Jersey, where witnesses are required, holographic Wills provide an exception to the witness requirement, provided that the testator's signature and material portions of the document are in the testator's handwriting. In New Jersey, any writing not in the testator's handwriting may still be considered a valid will if the proponent of the document establishes, by clear and convincing evidence, that it was intended to be a will. The cocktail napkin signed at the bar would be considered a "holographic will."

• Signed in another jurisdiction.

In both Pennsylvania and New Jersey, a will is considered validly executed if executed in compliance with the law of the jurisdiction where the testator was domiciled at the time of the execution of the will or at the time of his death (New Jersey goes further to also include, as validly executed wills, wills that were executed in compliance with law of place it was executed).

• Notary and self-proving wills.

Although wills are not required to be notarized in Pennsylvania or New Jersey at the time of signing, it is strongly advisable to have a will notarized in order to have it be a "self-proved will." A self-proving will is a will with a notarized affidavit of the testator and witnesses. A self-proving will permits the testator along with the witnesses to authenticate the identity and signature of the testator so that no further proof is later required after the testator's death at the time of probate, avoiding the need for witnesses to appear before the Register of Wills/Surrogate's Court as part of the probate process. This makes the probate process more efficient and less burdensome since there will be no need to locate and contact the witnesses as part of that process. In Pennsylvania, however, it is not possible to "self-prove" a will signed by mark or by another; further proof of the validity of execution will be required as part of the probate process.

In New Jersey, a lawyer is considered a notary. In Pennsylvania, if a notary is not available, a lawyer who is not a notary may sign an acknowledgment and later have his signature certified by a notary.

In Pennsylvania, if the will is not "self-proven," then, at the time of probate, the witnesses to the Will must attest to their signatures in person in the office of the Register of Wills or by completing an oath of the subscribing witness before a notary public (if the will was executed by mark then the witnesses must take the oath before the Register of Wills). If the will was not witnessed, or the subscribing witnesses have died, moved out of state, cannot be located, or are otherwise unavailable, then witnesses who are familiar with the testator's signature and can identify the signature on the Will as the signature of the testator can complete an oath for nonsubscribing witnesses.

In New Jersey, if a will is not "self-proving," then, at the time of probate, one of the two witnesses who signed the will as a witness or a "bystander witness" (one who witnessed the testator and the two witnesses sign the will, but they themselves did not sign the will) must also come to the Surrogate's Court to authenticate the witnesses' signatures. If the witness to the will is outside the county or the state at the time of probate, the surrogate will order a commission to another surrogate (in state) or notary public (out of state) to take oath of the witness to the Will in the jurisdiction where the witness is located.

• Probate of signed copy of will.

Maintaining the original signed will is extremely important since an original will is required to filed with the local court records to commence a standard probate process (no e-filing yet in Pennsylvania or New Jersey). If the original will cannot be located, in order for a copy of an executed Will to be admitted to probate, in Pennsylvania the proponent of the copy must petition the Register of Wills and include evidence in the petition to rebut the presumption that the testator destroyed the original with the intention to revoke it. In the petition, an explanation of when and where the original document was executed and why it cannot be produced should be given. Similarly, in New Jersey, the proponent of the copy of the will must file a verified complaint and order to show cause before a Surrogate's Court will be able to probate the copy. These petitions/court filings are certainly more costly (and burdensome) than the standard practice of admitting an original Will to probate in the appropriate office of the local court (at the Register of Wills for a Pennsylvania decedent and at the Surrogate's Court for a New Jersey decedent). For this reason, an original will should

be kept in a safe place (oftentimes wills are held in fire proof vaults at the lawyer's office, or clients may keep Wills in their bank safe deposit box), and the lawyer or person named as Executor under the will should know where it is located.

• Revocation of a will.

Just as there are execution requirements for a valid will, there are also certain requirements to effectively revoke or cancel a previously executed will. A revocation of a will can be accomplished by burning, tearing, cancelling, obliterating or destroying a Will with the intent and for the purpose of revocation, by the testator or by another person in the testator's presence and with the testator's direction. In Pennsylvania, if the act is done by any person other than the testator, the testator's express direction must be proved by the oaths or affirmations of two competent witnesses. Also, the execution of a subsequent valid will or codicil can be structured to effectively revoke any prior wills (or codicils). Extreme care must be taken so that a testator does not unintentionally revoke a prior will when intending to make a mere amendment to the prior will. Any codicil which amends a prior will should include a statement that the codicil is republishing the Will subject to the modifications made by the Codicil so that the codicil does not inadvertently revoke the will to which it is referring.

As long as all of the execution requirements are met, wills do not need to be in a particular format or on special paper. In fact, wills written on napkins, suicide notes or other writings which comply with state law have been probated as valid wills (and codicils). These types of documents may be written when in a bind, but it is not advisable to rely on these documents. In the long term, having an estate planning lawyer draft a will and, when possible, supervise the execution of the will, is always advisable. This will ensure that the will covers all of the property in the estate, covers all potential relevant contingencies, names the proper fiduciaries to carry out the testator's wishes and properly coordinates the tax clause and other provisions in the Will so that there are no unintended consequences. •

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