CHAPTER 5

The Last Will and Testament

CHAPTER OUTLINE

§ 5.1 Wills and Testaments
§ 5.2 State Statutory Formalities
§ 5.3 Changing and Revoking Wills
§ 5.4 Joint and Mutual Wills
§ 5.5 Agreements to Devise or Bequeath Property
§ 5.6 Grounds for Contesting a Will

CHAPTER OUTCOMES

• Describe the legal requirements for executing a will in your state.
• Explain the methods of changing and revoking wills under the laws of your state.
• Recognize possible grounds for contesting a will.

JOB COMPETENCIES

• Be able to assist the attorney in overseeing the process of a client’s signing a will.
• Be able to identify signs of a client’s possible incapacity to execute a will.
• Be able to prepare an initial draft of a codicil under the supervision of an attorney.
• Be able to recognize situations that could lead to a will contest.
A DAY AT THE OFFICE . . .

Angela Clark, a paralegal in the office of Dillon & Harvey, was given the assignment of interviewing an elderly client in a nursing home for the purpose of drafting the client’s will. The client, Mrs. Frothmeyer, acted friendly and smiled pleasantly when she was introduced to Angela by a nursing home attendant. The moment the attendant left, however, Mrs. Frothmeyer whispered to Angela that she needed a will because the people in the nursing home were planning to kill her. Mrs. Frothmeyer said that a bomb had been placed under her bed and was timed to go off at midnight that night; the patient in the next room was scheming to steal all of her furniture. She knew this because she had heard people plotting against her in the middle of the night.

When Angela asked for the names of her children, Mrs. Frothmeyer replied that she had no children. She said that she wanted a new will leaving everything she owned to an aide at the nursing home who had been especially kind to her.

After leaving Mrs. Frothmeyer, Angela inquired at the desk for the name of Mrs. Frothmeyer’s guardian and discovered that it was her daughter, Vivian.

Queries:

1. Does Mrs. Frothmeyer have testamentary capacity?
2. What ethical issues arise in this situation?
3. How should they be addressed?

§ 5.1 WILLS AND TESTAMENTS

Paralegals need good judgment and interpersonal skills when interviewing clients for the preparation of the clients’ wills. A testator must be of sound mind at the time of execution of the will in order for the will to be valid. As discussed later in this chapter, being able to assess whether a client is of sound mind becomes crucial when the paralegal is asked to witness the will: witnesses may later be asked to vouch for the mental stability of the testator if the will is contested.

Besides dealing with the person behind the will, paralegals must be familiar with specific requirements of the legal document itself: for example, that wills must be in writing in most cases; that specifically two witnesses must be present; that witnesses must sign in each other’s presence or in the presence of the person making the will; that real estate is treated differently from personal property. Understanding the rationale behind these details requires a brief look at history.

The law of wills, estates, and trusts of today has its roots in the feudal system that prevailed in England in the eleventh, twelfth, and thirteenth centuries. In those days, it was considered a disgrace to die without a testament, which was a will of personal property; wills of real property were not generally allowed. Until the
Reformation, the church, rather than the state, had jurisdiction over the law of
testaments of personal property in England. Testaments were received orally by a
priest as part of the last confession; the church frequently received gifts of
personal property when people died. In fact, much of the law relating to
testaments was developed by the church.

In the fourteenth century, a method evolved whereby landowners could
bypass the law against making wills of real property. Under this rather ingenious
procedure, X (a landowner) would give real property to Y “to the use of X for life
and then to the use of X’s will.” X would then draft a will declaring a use in favor
of Z. Since X still had the use of the property and therefore benefited, X was
considered the beneficial owner. Y, however, was the legal owner until X died,
and then Z became the owner. This arrangement was the forerunner of our
present-day trust, discussed in Chapter 8.

Even before his daughter became a movie star and Princess
Grace of Monaco, John (“Jack”) B. Kelly, Jr., was a prominent
figure in Philadelphia, having risen from bricklayer to millionaire
contractor. In his unorthodox yet legal will, Kelly replaces legal
jargon with personality and wit. He speaks for himself from the
beginning:

For years I have been reading Last Wills and Testaments and I have never been able to
clearly understand any of them at one reading. Therefore, I will attempt to write my own
Will in the hope that it will be understandable and legal. Kids will be called “kids” and not
“issue,” and it will not be cluttered up with “parties of the first” ... and a lot of other terms
that I am not sure are only used to confuse those for whose benefit it is written.

After allocating his property, he speaks to his family:

In this document I can only give you things, but if I had the choice to give you worldly
goods or character, I would give you character. The reason I say that, is with character you
will get worldly goods because character is loyalty, honesty, ability, sportsmanship and, I
hope, a sense of humor. If I don’t stop soon, this will be as long as Gone With the Wind, so
just remember, when I shove off for greener pastures or whatever it is on the other side of
the curtain, that I do it unafraid and, if you must know, a little curious.

With characteristic flair, Kelly signed the will in Kelly green ink.
To regain revenues and reduce fraud, England enacted the Statute of Uses in 1536. Under the statute, when X conveyed land to Y “to the use of Z,” the use in the hands of Y was destroyed, and full ownership to the property went immediately to Z. Thus, it once again became impossible to dispose of real property by will.

The inability to leave real property by will caused such outrage that England passed the Statute of Wills in 1540, allowing wills of real property to be made “in writing” by most landowners. When feudalism ended in 1660, all land could be disposed of by a written will.

In 1677, more formal requirements were imposed upon wills by the passage of the English Statute of Frauds. That statute declared that a will of real property “shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses.”

A will of personal property under the English Statute of Frauds could be oral unless the value exceeded 30 pounds; in that case, the will was not valid unless: (1) it was proved by the oath of three witnesses present when it was made, (2) the testator made the persons present bear witness to the will, (3) the will was made in the last sickness of the testator, and (4) the testimony was given within six months or committed to writing within six days after the will was made.

Technically, the term will refers to an instrument that disposes of real property and the term testament refers to an instrument that disposes of personal property. Thus, will and testament refers to an instrument that disposes of both real and personal property. This distinction is not made, however, in practice in the United States today.

A gift of personal property in a will is called a bequest or legacy except in states that have adopted the Uniform Probate Code. A person who makes a gift of personal property in a will is known as a legator, and a person to whom the gift is given is referred to as a legatee or beneficiary. The verb bequeath means to give personal property by will.

A gift of real property in a will is called a devise. In states that have adopted the Uniform Probate Code, the term devise refers to both real and personal property. A person who makes a gift of real property in a will is called a divisor, and a person to whom the gift is given is known as a devisee. One who is deceased is termed a decedent.

§ 5.2 STATE STATUTORY FORMALITIES

Paralegals who work in the field of wills, estates, and trusts must become familiar with their own state statutes governing the formalities of executing a will. This is because each state in the United States has passed its own statutes setting forth the requirements for executing a will. Except for states that have adopted
the Uniform Probate Code (see Exhibit 4–1), the laws are not uniform. State statutes follow either the requirements of the English Wills Act, the English Statute of Frauds, or a combination of the two. Some differences in the two English statutes are listed here.

1. The English Wills Act required the signature of the testator “at the foot or end thereof.” This was not required under the English Statute of Frauds. As you will learn, some states, such as New York, still require a will to be signed by the testator at the end of the will.
2. The English Wills Act required two witnesses, whereas the English Statute of Frauds required three witnesses. Until recently, some states in the United States required two witnesses to a will; others required three. Most states today, however, require only two witnesses to a will.
3. The English Wills Act required that the witnesses be present at the same time, whereas the English Statute of Frauds allowed witnesses to attest separately. Some states today follow the English Wills Act; others follow the English Statute of Frauds relative to the presence of witnesses to the signing of a will.
4. Both statutes required that witnesses attest in the presence of the testator.

**Age Requirements**

Under the laws of most states, a person must have reached the age of 18 to make a will. People reach the age of 18 on the day before their 18th birthday, because people are considered to have lived the entire day on which they are born. Since the first day of life is counted, infants are 365 days old on the day before their first birthday and are actually one year and one day old on their first birthday.

Some state variations exist on the general age requirement of 18. For example, in Georgia, the age to make a will is 14; in Louisiana, the age is 16; in Texas, married people under the age of 18 may make wills; and in California, emancipated minors may make wills. Members of the armed forces and the merchant marines may make a will at any age in the states of Indiana and Texas.

**Testamentary Capacity**

For a will to be valid, the person making the will must have **testamentary capacity**. This means that he must be of **sound mind** at the time of execution of the will. There is a four-part test to determine soundness of mind. Testators must:
1. know, in a general way, the nature and extent of their bounty (i.e., riches).

2. know, in a general way, who would be the natural objects of their bounty (although they need not leave anything to them).

3. know that they are making a will; and

4. be free from delusions that would influence the disposition of their property.

In the opening “A day at the office ...” scenario, Mrs. Frothmeyer would not pass the test of soundness of mind. Apparently she was having delusions about a bomb being placed under her bed, and she did not know that she had a daughter—a natural object of her bounty.

As suggested earlier, paralegals are often called upon to witness wills, so they may have to determine if an unfamiliar testator is “of sound mind.” Conversation is the natural way to explore someone’s mental capabilities, especially when dealing with elderly clients. Asking questions about the testator’s family, occupation, places of residence, travels, and leisure-time activities can be an effective way to get to know the testator in the short time available. As a matter of practice, carefully annotating the client’s file with your discussion and observations of your client’s capacity will be useful if questions of competence arise in the future.

The burden of proving the soundness of mind of the testator falls on the proponent of the will—that is, the person presenting the will to the court. Establishing the testator’s soundness of mind is usually done by offering the will itself, the affidavits of subscribing witnesses, and the judgment admitting the will to probate. In a will contest, witnesses and the testator’s physician are usually asked to testify as to the testator’s mental capacity. Therefore, the paralegal’s role in witnessing wills is a serious responsibility. The paralegal must evaluate the testator’s mental capacity exclusively at the time of execution of the will. The Hedges case demonstrates that lapses of mental ability in an elderly person do not invalidate the required soundness of mind on the day a will (or codicil) is executed. Capacity is a snapshot event in the law of wills. Only the mental ability at the time of execution is important. The maker’s capacity on the day before or the day after is not relevant.

**Necessity of a Writing**

With the exception of certain nuncupative wills (oral wills) allowed by a few states, wills must be in writing. Many states recognize nuncupative wills of personal property made by soldiers in military service and mariners at sea. Some states also recognize nuncupative wills of very small amounts of personal property and nuncupative wills of personal property made during a last illness when witnesses are present.
A **holographic will** (sometimes spelled olographic) is a will that is entirely in the handwriting of the testator and signed by the testator but not witnessed. About half of the states in the United States recognize holographic wills as being valid (see Exhibit 5–1). The rest of the states do not allow them because of the lack of witnesses. Under the UPC, a holographic will is valid if the signature and the material (i.e., important) portions of the document are in the testator’s handwriting (see Exhibit 5–2) [UPC § 2-502]. Holographic wills are open to the challenge that they are intended as a rough draft to take to an attorney rather than as the decedent’s final draft of the will.

The courts have held that an audiotape recording does not meet the requirements of a holographic will, as illustrated by the Reed case. Also, videotaped wills are not valid. Sometimes, you may see an attorney advertise that he does audio or video wills, but the audio or video is a nonbinding, peripheral to the valid formal written will; it is a bit of a gimmick or marketing exercise.

Alternately, if one can present evidence to question competence, one can at least raise a question for the jury.

**EXHIBIT 5–1** States that Allow Holographic Wills
EXHIBIT 5–2 This Form Is Used in California to Prove a Holographic Will
### Matter of Hedges

**FACTS:** On the eve of her 102nd birthday, Nelly Hedges executed a will in which she devised her residence to her long-time friend, Halsey Brower. Seven months later, she signed a codicil to the will revoking the devise to Brower and leaving the residence to her church. After her death, Brower objected to the allowance of the codicil, claiming that Hedges lacked testamentary capacity. Brower offered testimony to indicate that at various times before and after signing the codicil, Hedges had suffered delusions and was irrational and forgetful. No evidence was offered to contradict the testimony of the subscribing witnesses, which established that at the time the codicil was executed, the testatrix was of sound mind and capable of understanding the nature of her action.

**LEGAL ISSUE:** Is evidence that an elderly testator suffered delusions and was irrational and forgetful before and after signing a codicil, when witnesses testified that she was of sound mind, sufficient to establish lack of testamentary capacity?

**COURT DECISION:** No.

**REASON:** It has long been recognized that old age, physical weakness, and senile dementia are not necessarily inconsistent with testamentary capacity as long as the testatrix was acting rationally and intelligently at the time the codicil was prepared and executed. Furthermore, evidence relating to the condition of the testatrix before or after the execution is significant only insofar as it bears upon the strength or weakness of mind at the exact hour of the day of execution. Thus, the evidence adduced at trial was entirely insufficient to establish lack of testamentary capacity at the exact time of the codicil’s execution.

### Bolan v. Bolan

**FACTS:** Charley Bolan died October 8, 1990. He had executed a will on September 6, 1990. There were three witnesses present at the signing; the two people who witnessed the will, and the notary public who notarized the signatures. Several other family members, as well as a neighbor, were also in the house. The witnesses all agreed at trial that the deceased was competent at the signing, but the other people present, all of whom knew

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**CASE STUDY**  
*Bolan v. Bolan* (continued)

Charley well, testified that his mind was not sound, and had been deteriorating for some time. The trial court instructed the jury that the witnesses assertions were definitive as to competence.

**LEGAL ISSUE:** Should the trial court have judicially determined the competence of the testator?

**COURT DECISION:** No.

**REASON:** Although the threshold of competence as to wills is fairly low, when questions of the soundness of the testator arises, conflicting views need be presented to the jury for determination, not judicially determined. “When testamentary capacity is at issue, this Court has held that a very broad factual inquiry is desirable ...”

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**CASE STUDY**  
*Matter of Estate of Reed*

672 P.2d 829 (WY)

**FACTS:** Robert G. Reed died without a formally drawn will. However, a sealed envelope was found among his belongings on which was written in his handwriting, “Robert G. Reed To be played in the event of my death only! Robert G. Reed.” The envelope contained an audiotape recording of Mr. Reed’s directions for the distribution of his assets when he died. The court recognized that the voice-recorded statement did resemble a nuncupative will, but noted that nuncupative wills are not valid in the state of Wyoming.

**LEGAL ISSUE:** Does an audiotape recording that is placed in a sealed envelope with handwritten instructions that it be played only in the event of death amount to a holographic will?

**COURT DECISION:** No.

**REASON:** The envelope notation, standing alone, has no testamentary consequence and cannot be considered a will. Moreover, the statute is not complied with even if the tape and writing are considered together, because no part of the alleged will could be considered to be in the testator’s handwriting.
The Will’s Execution

Paralegals working in law offices often play key roles in the execution of wills. It is important that they be thoroughly familiar with their state law on signing and witnessing requirements, because wills can be contested if not properly executed. Wills must be signed, attested, and witnessed in accordance with the precise rules of the state in which the will is executed. This is one of the reasons why it is dangerous for lay persons to make their own wills. Most lay persons are not aware of the technical rules that must be followed when executing a will.

Signature Requirements

Written wills must be signed either by the testator or by someone else in the testator’s presence who is directed to do so by the testator. A signature may be any mark that the testator intends to be a signature. Thus, a barely discernible signature written by an elderly person’s shaking hand, or an X made by someone who cannot write, are accepted as signatures if the intent of the person writing it was to authenticate the instrument.

Signatory intent may be proved by either documentary evidence or the testimony of witnesses with respect to the purpose behind the signing. It may also be proved by the completeness of the document as a testamentary instrument. Thus, if a will is complete, a handwritten name at the beginning may be considered a signature by the court. However, when the document does not appear to be a complete testamentary instrument, a handwritten name located somewhere other than at the end may not be considered valid. To illustrate, Robert Erickson had written notes on three unnumbered three-by-five-inch cards. One card began: “8/22/73 Last Will & Tes I Robert E. Erickson do hereby state that I leave and bequeath to the following persons of my family & others on my demise ... .” The court held that the cards were not a valid holographic will. The court said that the cards did not have sufficient completeness to infer that Erickson intended his name on the first card to be his signature. Nothing indicated the order of the cards or that Erickson had finished his writing [Matter of Estate of Erickson, 806 P.2d 1186 (UT)].

In the states indicated in Exhibit 5–3, the testator’s signature must be written at the end of the will. To illustrate, the Pennsylvania statute states, “Every will shall be written and be signed by the testator at the end thereof.” The Hopkins case points out the danger of making a will without obtaining sound legal advice.

Most states, however, do not require the testator’s signature to be at the end of the instrument. For example, in Illinois, “Every will shall be in writing, signed by the testator or by some person in his presence and by his direction and attested in the presence of the testator by two or more credible witnesses” [Ill. Rev. Stat. ch. 110fi para. 4–3 (1985)]. This statute was referred to by the Illinois court in deciding the Carroll case.
EXHIBIT 5–3 States that Require Testator’s Signature at the End of a Will

FORGERY WHEN STAKES ARE HIGH

When he arrived in the United States as a child in 1906, Stanley Newberg helped his father peddle fruit on the Lower East Side of New York. As an adult, he worked his way through law school before becoming cofounder of two successful aluminum products companies.

When he died at age 81, Newberg left $5.6 million to the United States government as an “expression of deep gratitude for the privilege of residing and living in this kind of government—notwithstanding many of its inequities.” At the time of his death, he had no surviving blood relatives. His wife, to whom he had been married for more than 40 years, had died 7 years earlier. She had had three children from a previous marriage, but Newberg never adopted them.

Outraged over the size of his bequest to an “outside” source, the three middle-aged children contested the will. They claimed to have a document signed by Newberg that entitled them to half of his assets upon his death. A handwriting expert concluded, however, that the document had been forged.

The children settled out of court for an unrevealed amount, and Newberg’s bequest was sent to the Bureau of Public Debt to help pay general government expenses. The funds covered less than two minutes of government spending, based on the 1994 federal budget of $1.5 trillion.
CASE STUDY  

**In Re Estate of Hopkins**

570 A.2d 1058 (PA)

**FACTS:** A four-page document that had been handwritten on lined notepad paper was introduced in court as the will of Edna A. Hopkins. Hopkins had signed her name vertically along the margin of each page, but she failed to sign the document at the end.

**LEGAL ISSUE:** In Pennsylvania, must a will be signed by the testator at the end of the instrument?

**COURT DECISION:** Yes.

**REASON:** The Pennsylvania statute requires that a will be signed by the testator "at the end thereof." This requirement was enacted to prevent the probate of unfinished papers and mere expressions of intent. By signing at the end of a document, the writer has expressed that he has decided on a testamentary scheme and that the writing is not half-formed thoughts never intended to be operative. The will was not allowed, causing Hopkins’s property to pass by intestacy.

CASE STUDY  

**In Re Estate of Carroll**

548 N.E.2d 650 (IL)

**FACTS:** Genevieve B. Carroll filled out a printed form and signed it on the first line in a sentence declaring the document to be her last will and testament. Near the end of the document, she inserted the date and year in the blank spaces in a line reading: "IN WITNESS WHEREOF I have hereunto set my hand and seal this day of ,19. She did not sign the will a second time. The will was properly witnessed.

**LEGAL ISSUE:** In Illinois, must a will be signed by the testator at the end of the instrument?

**COURT DECISION:** No.

**REASON:** The Probate Act does not require that the testator’s signature appear at the end of the will. It is immaterial where in the will the signature of the testator is placed, if it was placed there with the intention of authenticating the instrument. The way the will was filled in suggests that the deceased intended her signature at the beginning of the will to be her authoritative signature.

Will signature requirements, when statutorily provided, must be met exactly in each state. No room for flexibility or interpretation i allowed. This holds true for witness requirements as well.
**Witness Requirements**

In most states, competent witnesses must witness nonholographic wills in the presence of the testator. With the exception of Pennsylvania (which requires no witnesses except when the testator signs by mark), Louisiana (which requires two witnesses and a notary public), and Vermont (which requires three witnesses), all states in the United States require two witnesses to a will. Some state laws stipulate that the witnesses be in each other’s presence when they sign as witnesses to a will. The map in Exhibit 5–4 indicates the states with this requirement. Paralegals who work in one of these states must be aware of the rule, because a violation can cause a will to be invalidated.

The act of witnessing a will consists of two parts, attesting and subscribing. To **attest** means to see the signature or take note mentally that the signature exists as a fact. To **subscribe** means to write beneath or below. Usually courts hold that witnesses to wills must do both. Thus, some cases have held that a will was improperly executed—and therefore void—when the testator refused to allow the witnesses to see his signature, which he had previously written.

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**EXHIBIT 5–4** States that Require Witnesses to a Will to Sign in Each Other’s Presence

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**Attest**

Swear to; act as a witness
to; certify formally, usually in writing.

**Subscribe**

Sign a document (as the person who wrote it, as a witness, etc.).
Some states avoid this problem with *attestation* by the use of suitable language in their statutes. For example, the Virginia law states that a testator’s signature:

... shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The *Robinson* case illustrates that the courts do not interpret the word *subscribe* literally.

In some states, witnesses who are named as beneficiaries under the will lose the inheritance unless there are two other witnesses who inherit nothing under the will. If *Robinson v. Ward* had occurred in Massachusetts, for example, Ward would not have inherited, because she was a witness to the will and two other witnesses were not present. Even spouses of witnesses often lose their inheritances unless there are extra witnesses who do not inherit under the will. Many states, however, protect witnesses who make the mistake of witnessing a will under which they are also beneficiaries. Their laws provide that if the witness would have inherited had the testator died intestate, the witness may inherit the amount in the will, but not more than the intestate share.

### CASE STUDY  
**Robinson v. Ward**

387 S.E.2d 735 (VA)

**FACTS:**

When Joane G. Tannehill became ill, she told her very good friend, Katherine D. Ward, to get a legal pad and “Write exactly what I say, and do not interrupt me.” As Tannehill dictated, Ward wrote:

To Katherine D. Ward I leave everything I own for her lifetime. She is to maintain the farm & provide employment for Penny Guin for as long as Penny cares to stay. I would hope that Katherine can maintain the farm & herself with the income from the farm & interest on my principal. At her

(continues)
The 1990 revision of the UPC goes even further, by giving full protection to witnesses when they inherit under the will. The revised law states that the signing of a will by an interested witness does not invalidate the will or any provision of it [UPC § 2-505]. The map in Exhibit 5–5 indicates the states that follow these rules when a witness to a will is also a beneficiary under that will.

Witnesses to a will must be competent. In general, this means competent to be a witness in a court of law. Massachusetts has defined competency as being of "sufficient understanding," meaning that the witness understands what a will is and what is taking place when the will is executed. While age is of importance, it is not the test. To determine whether a person is of "sufficient understanding" to be considered competent the courts of this Commonwealth have long applied a two-prong test: (1) whether the witness has the general ability or capacity to observe, remember, and give expression to that which he or she has seen, heard, or experienced; and (2) whether he or she has understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter
and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment [Commonwealth v. Gamache, 626 N.E.2d 616].

Although most states have no age requirements for witnesses to wills, Arkansas and Utah require witnesses to be at least 18 years old, Iowa requires them to be at least 16 years old, and Texas requires them to be at least 14 old. As a matter of practice, paralegals and attorneys should only use witnesses of age 18 or older. In addition, engaging witnesses in a conversation, with the intent to establish their orientation as to time and place, is a solid practice. One should annotate the file as to this conversation for future reference if questions arise to the capacity of the witness.

Relaxation of Formalities

The 1990 revision of the UPC contains a section that relaxes the strict, formal requirements concerning the execution of wills if the proponent of the document establishes by clear and convincing evidence that the decedent intended the document to be a will [UPC § 2–503].
Professional Guidelines

To avoid the pitfalls of an improperly executed will, this procedure is recommended:

1. The testator is asked to read the will carefully, being certain that it is accurate, that it expresses the testator’s will, and that all aspects of the will are understood.

2. The proper number of witnesses are brought into the room and introduced to the testator; the door is closed, and the group should not be interrupted.

3. The testator declares to the witnesses that the instrument before them is his will and requests them to act as witnesses to its execution. The witnesses do not read the will.

4. The testator signs the will at the end, making sure that all witnesses observe the signature.

5. The testator initials or signs the margin of each page of the will for purposes of authenticity.

6. One witness reads the attestation clause (the clause preceding the witness’s signature) aloud. The witnesses then sign their names and write their addresses while the testator and other witnesses observe.

7. If a self-proof clause is used, a notary public, who must also be present, takes the oaths and acknowledgments of the testator and the witnesses.

§ 5.3 CHANGING AND REVOKING WILLS

Just as making a will involves technicalities, changing or revoking a will also requires certain formalities. Paralegals should encourage testators to seek competent legal advice whenever they want to alter their wills in any way.

Changing a Will

Altering the terms of a will is most effectively done through a codicil, which is a separate instrument with new provisions that change the original will in some way. In most states, a codicil must refer specifically to the will being changed and must be executed with the same formalities as are required for the execution of a will. The Montana court in the Kuralt case, however, did not follow the former rule in its interpretation of a letter serving as a codicil.

A properly executed codicil has the effect of republishing, that is, reestablishing, the will. It is said that a codicil breathes new life into a will. Thus, a will with only one witness or a will that has been revoked is reestablished.
with a properly executed codicil (see Exhibit 5–6). Unfortunately, the reverse is also possible. One may invalidate, or at least create a question about, a perfectly valid will. If, for example, there is no question of the testator’s competence at the time of will execution, but there is a question of competence at the time of the codicil’s execution, one may have damaged the original will.

Unfortunately, people often choose to avoid the expense of a lawyer and decide to cross out words or sections of their wills on their own. Such deletions may be accepted without being witnessed if evidence exists that the deletions were done intentionally by the testator. However, proving who made the markings and whether the changes were intended is difficult. Cross-out marks on wills cause confusion, invite contests, and can lead to costly litigation. This is particularly true with holographic wills.

CASE STUDY  In Re the Estate of Charles Kuralt

**FACTS:** Charles Kuralt maintained an intimate personal relationship with Elizabeth Shannon for almost 30 years, without the knowledge of his wife. The couple saw each other regularly and kept in touch by phone and mail. Kuralt was the main source of Shannon’s financial support during those years. They built a cabin together on a 20-acre parcel of land in Montana, and Kuralt owned 90 acres of adjoining land. In 1989, Kuralt made a holographic will leaving all of that land to Shannon. Five years later, he executed a formal will leaving everything to his wife and two children. Two months before he died, however, Kuralt deeded the 20-acre parcel with the cabin to Shannon and indicated his intention to deed her the 90-acre site. He became suddenly ill however. After entering a hospital, he wrote Shannon a letter saying among other things, “I’ll have the lawyer visit the hospital to be sure you inherit the rest of the place in MT if it comes to that.”

**LEGAL ISSUE:** Can a letter expressing one’s intent to leave a gift by will be considered a valid holographic codicil to an existing will in Montana?

**COURT DECISION:** Yes.

**REASON:** Montana courts are guided by the bedrock principle of honoring the intent of the testator. The letter met the threshold requirements for a valid holographic will. It expressed a present testamentary intent to transfer the property to Shannon. The official comments to the Montana Code states: “when the second will does not make a complete disposition of the testator’s estate, the second will is more in the nature of a codicil to the first will.” The letter was a codicil as a matter of law because it made a specific bequest of the Montana property and did not purport to bequeath the entirety of the estate.
FIRST CODICIL TO WILL OF FRANCIS ALBERT SINATRA  
also known as FRANK SINATRA

I, FRANCIS ALBERT SINATRA, also known as FRANK SINATRA, do hereby declare this to be a First Codicil to my Last Will and Testament dated September 3, 1991.

I.

I hereby delete Section C of Clause FIFTH of said Last Will and Testament and in lieu and in place thereof insert the following new Section C:

“C. To ELVINA JOUBERT of Rancho Mirage, California, if she survives me, the sum of One Hundred Fifty Thousand Dollars ($150,000). If ELVINA JOUBERT does not survive me, this gift shall lapse and shall be considered as part of the residue of my estate.”

II.

I hereby delete in its entirety Section D of Clause FIFTH of said Last Will and Testament by reason of the death of JILLY RIZZO.

III.

In all other respects I hereby reaffirm and republish my Last Will and Testament dated September 3, 1991.

Signed at RANCHO MIRAGE, California on MAY 1, 1993.

FRANCIS ALBERT SINATRA  
also known as FRANK SINATRA

ADMITTED TO PROBATE  
Date JUN 18 1998  
Attest: JOHN A. CLARKE, COUNTY CLERK  
by (signed) Deputy

ATTESTATION AND DECLARATION

The testator, FRANCIS ALBERT SINATRA, also known as FRANK SINATRA, on the date written above, declared to us, the undersigned, that the foregoing instrument, consisting of two (2) pages, including the page signed by us as witnesses, is his First Codicil to his Last Will dated September 3, 1991 and requested us to act as witnesses to it. Then the testator signed this First Codicil in our presence, all of us being present.

EXHIBIT 5–6a Codicil to Frank Sinatra’s Will
Additions to a will following its execution have no legal effect unless the will is re-signed by the testator and reattested by the proper number of witnesses. As discussed earlier, paralegals should encourage testators to seek proper legal expertise when considering changes to their wills. Making a new will or adding a codicil to the existing will is an effective way to avoid future problems.

Either task can be performed easily and speedily through the use of a word processor. Computerized systems allow documents to be easily retrieved and updated. Personal data may have to be changed, as in the case of a marriage, divorce, death, or adoption; a condition or clause in a will (or trust) agreement may no longer be valid. With word-processing software, these changes require a few keyboard strokes and little time. Standardized forms may be retrieved on the computer and then customized for the client. Whole paragraphs may be reworked, deleted, or rearranged with minimal effort and time.
Revoking a Will

State statutes set forth precise methods for revoking (canceling) a will. The act of revoking a will must be accompanied by the testator’s intent to revoke the will. There are four principal methods of revoking a will:

1. The English Statute of Frauds declared that a will could be revoked by “burning, canceling, tearing, or obliterating.” (See sample in Exhibit 5–7.) The English Wills Act prescribed “burning, tearing, or otherwise destroying.” Most American statutes use the language of one of these acts.
2. In general, the execution of a new will revokes a prior will. To revoke a prior will in some states, however, the new will must either expressly state that it revokes an earlier will or be inconsistent with the old will; otherwise, the new will is treated as a supplement (like a codicil) to the old will. The 1990 revision of the UPC attempts to clarify this rule with the following language:

EXHIBIT 5–7  Sample of Canceled Holographic Will
The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator’s estate [UPC § 2–507(c)]. The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator’s estate [UPC § 2–507(d)].

Sometimes the act of destroying a will does not revoke it. This occurs when a testator cancels a valid will after making a new one, and the new will turns out to be void. Under a rule known as the doctrine of dependent relative revocation, the canceled will is held to be effective in order to avoid intestacy. The reasoning behind the rule is that the testator’s intent was to cancel the will only if the new will became effective. If the new will is not effective, the canceled will is revived.

3. The subsequent marriage of a person who has made a will revokes the will in some states unless the will declares that it is made in contemplation of marriage to a particular person. In a small number of jurisdictions, subsequent marriage revokes a will only when a child is born of that marriage. In Georgia, Kansas, Louisiana, and South Dakota, the birth of a child revokes a will unless the child is provided for in the will. In a few states, instead of revoking a will completely, subsequent marriage revokes only gifts made in a will to a former spouse. The map in Exhibit 5–8 indicates the effect of subsequent marriage under the laws of different states.

4. Under the laws of many states, a divorce or dissolution of marriage revokes bequests and devises to a former spouse—but not the will itself—unless the will specifically provides otherwise. In addition, a divorce revokes the appointment of the former spouse as an executor or trustee under the will. See Table 5–1.

State statutes differ with regard to the annulment of a marriage. An annulment revokes the entire will in Maryland and West Virginia. In many states, however, instead of revoking the entire will, an annulment revokes only gifts in the will to a former spouse. The Knott case illustrates the Kentucky rule as to the effect of an annulment on a will.

<table>
<thead>
<tr>
<th>Table 5–1 Effect of Divorce on Bequests to Former Spouse</th>
</tr>
</thead>
<tbody>
<tr>
<td>A divorce revokes an entire will in:</td>
</tr>
<tr>
<td>A divorce has no effect on a will in:</td>
</tr>
<tr>
<td>A divorce revokes all gifts made in a will to a former spouse in:</td>
</tr>
</tbody>
</table>
EXHIBIT 5–8 Effect of Subsequent Marriage upon Will

CASE STUDY  Knott v. Garriott

784 S.W.2d 803 (KY)

FACTS: Following his wife’s death, Wilbert Martin executed a will. Four years later, Martin married Barbara Mattingly. That marriage was annulled shortly thereafter because of Martin’s incapacity to consent to marriage.

LEGAL ISSUE: Does a marriage, subsequently annulled, revoke a will made prior to the marriage?

COURT DECISION: No.

REASON: A decree annulling a marriage is a declaration that no valid marriage ever existed. An annulled marriage is void ab initio (from the beginning) and cannot operate to invalidate a will made prior to the marriage.
Sometimes, a testator will leave his entire estate to a particular person without mentioning in the will that he intends to marry that person. Shortly thereafter, the testator marries that person, and the question later arises as to whether the subsequent marriage revoked the will. Courts have held, in recent cases, that the will is not revoked in this situation because there is clear and convincing evidence that the will was made in contemplation of the marriage, even though that fact was not mentioned in the will itself.

§ 5.4 JOINT AND MUTUAL WILLS

A joint will is one instrument that serves as the will of two or more people. The instrument is probated (proved and allowed by the court) each time a cotestator dies. Generally, it is not good practice to draw joint wills: the parties may separate; one of them, rather than both, may have custody of the will and the other may not know its whereabouts; one of them may destroy the will without the other’s knowledge or consent. It is better to draw a separate will for each testator, even if the wills are identical.

Mutual wills (also called reciprocal wills) are separate, identical wills for each testator containing reciprocal provisions accompanied by an agreement that neither testator will change his will after the death of the other. The Johnson case involved a will that was both joint and mutual and contained a provision requiring mutual agreement for the will to be changed.

**CASE STUDY**  
*In Re Estate of Johnson*

781 S.W.2d 390 (TX)

**FACTS:** Soon after being married, Emma and James Johnson executed a joint will. Both had been previously married and had several children by their prior marriages. The will, among other things, provided for Emma’s son and contained the following provision: “... this is our joint and mutual will made by each in consideration of the other so doing and shall be irrevocable excepting by the mutual agreement of both.” Four years later, unbeknownst to Emma, James executed a new will, revoking the earlier will and providing for his son instead of Emma’s son. Emma learned of the new will when James died seven years later.

**LEGAL ISSUE:** May a joint and mutual will stating that it is irrevocable except by mutual consent be revoked by one cotestator without the consent of the other?

**COURT DECISION:** No.

(courts continue)
A written contract to provide for another by will is enforceable in most states; an oral contract is not. However, to prevent unjust enrichment, anyone who furnishes services to another based on the other’s oral promise to leave a gift by will can recover the fair value of those services from the other’s estate.

§ 5.5 AGREEMENTS TO DEVISE OR BEQUEATH PROPERTY

Agreements to devise or bequeath property to someone in a will must be in writing to be enforceable. This type of agreement occurs most often when a caregiver agrees to care for an elderly person in exchange for receiving something under the elderly person’s will. In such cases, the caregiver must be careful not to use undue influence in arranging the transaction, which would invalidate the gift. The Uniform Probate Code (§ 2–514) provides that a contract to make a will or devise, or not to revoke a will or devise, or to die intestate can be established only by:

• provisions of a will stating the material provisions of the contract; or
• an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
• a writing signed by the decedent evidencing the contract.

Example

**Agreement to Devise or Bequeath Property**

20A AMJUR LF WI § 266:29

It is further agreed that if [housekeeper] performs the terms and conditions specified in this agreement until the death of [testator], [testator] will, as part of the compensation for the services performed by [housekeeper], execute a valid will and testament in which the title and all rights to [testator’s] house and the land on which it is situated are devised to [housekeeper].
§ 5.6 GROUNDS FOR CONTESTING A WILL

To be able to contest a will, a person must have standing—that is, have some beneficial interest that will be lost if the will is allowed. This usually means that the person contesting would either inherit under an earlier will or under the law that is applied when someone dies without a will. As mentioned earlier, wills may be contested on the grounds of improper execution and unsound mind. Other grounds for contesting a will are fraud and undue influence.

To successfully contest a will on the ground of fraud, it must be shown that the testator relied on false statements when making the will. To contest a will on the ground of undue influence, it must be shown that the testator’s free will was destroyed and, as a result, the testator did something contrary to his true desires. The burden is on the person alleging fraud or undue influence to prove that those conditions existed. When there is fraud or undue influence, the court may disallow only part of the will, instead of the entire will, as in the case of improper execution and unsound mind. The Home For Incurables of Baltimore case illustrates how this same rule is applied when part of a will is illegal.

AN ARTISTIC FORTUNE

GEORGIA O’KEEFFE

Artist Georgia O’Keeffe died in 1986 at age 98 with an estate worth over $70 million. Excluded family members contested her will, claiming that Juan Hamilton, her male assistant for over 14 years and more than 50 years her junior, exerted “undue influence” over the aged artist. O’Keeffe had given Hamilton her power of attorney in 1978; as compensation, she left him her ranch and 21 paintings in her will of the following year. Over the years, she became even more liberal: in a second codicil of 1984, Hamilton’s share of the estate jumped from 10 to 70 percent, or to an inheritance of over $40 million. What ultimately occurred, however, was a settlement agreement among Hamilton, O’Keeffe’s sister, and O’Keeffe’s niece. What remained unresolved was whether Hamilton’s “influence” was a natural outgrowth of an enduring relationship or deliberate manipulation, and whether O’Keeffe would have favored the final compromise.

The Last Will and Testament

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SUMMARY

The law of wills, estates, and trusts has its origins in early England. Wills of real property were not always allowed in England. Until the end of feudalism in 1660, the church, rather than the state, had jurisdiction over the law of testaments, which were often made orally to a priest as part of the last confession.

In general, a person must be 18 years old and of sound mind to make a will. With limited exceptions for personal property, wills must be in writing and signed either by the testator or by someone else in the testator’s presence who is directed to do so by the testator. A signature may be any mark that the testator intends to be a signature. Some states require a testator’s signature at the end of
the instrument; others do not. Nonholographic wills must be witnessed in the presence of the testator by either two or three competent witnesses, depending on state law.

When items are crossed out of a will and there is evidence that the deletion was done intentionally by the testator, the deletion will be accepted even though it was not witnessed. In contrast, when additions are made to a will following its execution, the additions have no legal effect unless the will is re-signed by the testator and reattested by the proper number of witnesses. A codicil must refer specifically to the will being changed and must be executed with the same formalities as are required for the execution of a will. A properly executed codicil has the effect of republishing a will. Wills may be revoked by (1) burning, canceling, tearing, or obliterating; (2) the execution of a new will; (3) subsequent marriage, unless the will declares that it is made in contemplation of marriage to a particular person; and (4) in some states, divorce or annulment with regard to gifts made in a will to a former spouse (but not the will itself), unless the will specifically provides otherwise. A divorce or an annulment also revokes the appointment of the former spouse as an executor or trustee under the will.

A joint will is one instrument that serves as the will of two or more persons. Mutual or reciprocal wills are separate, identical wills for each testator that contain reciprocal provisions accompanied by an agreement that neither testator will change his will after the death of the other.

A person must have standing to contest a will. The most common grounds for contesting a will are (1) improper execution, (2) unsound mind, and (3) fraud or undue influence.

### REVIEW QUESTIONS

1. What is the technical difference between a will and a testament?
2. Under the law of most states, how old must a person be to make a will? When does a person reach that age?
3. What is the four-part test that determines soundness of mind to make a will?
4. When are nuncupative wills recognized?
5. How may wills be signed by testators?
6. How must nonholographic wills be witnessed?
7. The act of witnessing a will consists of what two parts?
8. Why should testators be discouraged from crossing things out of and adding things to their wills?
9. In what ways may a will be revoked?
10. Name the most common grounds for contesting a will.
1. William Cole made a will leaving his entire estate to Catherine Jackson and naming her executrix. The will stated, “I hereby cut off from this will and testament my brothers ... my only heirs-at-law.” Nothing in the will mentioned that it was made in contemplation of marriage to Jackson. Six months later, Cole married Jackson. Did the marriage to Jackson revoke Cole’s will? Why or why not? *D’Ambra v. Cole*, 572 A.2d 268 (RI).

2. Shortly before her death, Anita P. Clardy, a 79-year-old widow, executed a will leaving her property to various friends and relatives. She left only one dollar to each of her two adopted children “because of their vile attitude towards me since 1953 and the vile names they have called me.” The children contested the will on the ground that Mrs. Clardy lacked testamentary capacity. They claimed that Mrs. Clardy had become irrational and experienced false delusional beliefs regarding them and their treatment of her. In finding against the children, the trial court held that the burden of proof rests with the contestants and that the contestants had failed to meet that burden. Was the court’s decision correct? Explain. *Clardy v. National Bank*, 555 So. 2d 64 (MS).

3. Margaret C. Mergenthaler’s will consisted of four pages. Just before the will was executed, the pages were incorrectly stapled together so that page four, on which the testator signed, came before the residuary clause on page three. The law of that state requires that the testator sign the will “at the end” and provides that matter, other than the attestation clause, following the testator’s signature is ineffective. Was the residuary clause in this case ineffective? Why or why not? *Will of Mergenthaler*, 474 N.Y.S.2d 254 (NY).

4. Susanna H. Proley’s will was written in her own handwriting on a four-page printed form. The bottom of page three appeared as follows:

```
In Witness Whereof, I have hereunto subscribed my name and affixed my seal the 14th day of June in the year of our Lord one thousand nine hundred and 72

Signed, sealed, published and declared by the testator, within named, as and for last Will and Testament, in the presence of us, who at request, in presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

William Bentley

Alice Bentley
```

Susanna’s signature was written at the middle of the fourth page of the printed form beneath the printed words “Will of,” which appeared in a vertical position when the form was folded twice, as indicated on the following photographic reproduction:
Was Susanna’s signature written “at the end thereof” as required by Pennsylvania law? Why or why not? *In re Estate of Proley*, 422 A.2d 136 (PA).

### RESEARCH ON THE WEB

1. Log on to <http://www.lawguru.com> and click on Legal Questions. There, you can search a previously posted question and get the answer, or you can ask your own question.

2. You will discover thought-provoking and practical material of interest to the paralegal at <http://www.legalassistanttoday.com>.

### SHARPENING YOUR PROFESSIONAL SKILLS

1. Look up your state statute that permits a person to make a will, write down the statutory reference, and look for the answers to the following questions: (a) How old must a person be to make a will? (b) Is a holographic will recognized as valid? (c) How must a will be signed? (d) How must a will be witnessed?

2. Under your state statute, how may a will be revoked? Give the statutory reference where the provision is found.

3. Turn to the will of Stanley P. Goodchild in Chapter 6 (Exhibit 6–1). Draft a codicil, using today’s date, naming Stanley’s brother, Gilbert G. Goodchild, to serve as alternate guardian of his children. This is necessary because Stanley’s sister, Maureen N. Landers, has passed away.

4. Assume that you and your attorney meet with clients, a husband and wife, who would like to make joint wills. The attorney discourages the clients from making joint wills. When the clients leave, you ask the attorney why she discouraged them from doing so. The attorney suggests that you read the case of *Boucher v. Bufford*, 494 S.W.2d 503, and write a brief of the case.

5. Refer to Paragraph FOUR (B) of the will of Doris Duke (reproduced in Appendix B) and attempt to determine, through library research, why the loan was made to Imelda Marcos and whether it has been paid off.
SHARPENING YOUR LEGAL VOCABULARY

On a separate sheet of paper, fill in the numbered blank lines in the following anecdote with legal terms from this list:

attested
beneficiary
bequeath
bequest
codicil
decedent
dependent relative revocation
devise
devisees
devisor
devisees
execute
holographic
intestate
joint will
legacies
legatees
legator
mutual wills
nuncupative
probated
proponent
reciprocal wills
republishing
revoking
sound mind
subscribed
testament
testamentary
testamentary capacity
Jonathan O. Black and his wife, Mable Green-Black, neither of whom sought legal advice, executed one instrument that served as the will of both of them. It was called a(n) (1) and had only one witness who (2), that is, saw the signatures, and (3), that is, signed below Jonathan’s and Mable’s signatures. Jonathan was the (4). Mable was the (5). If, instead, they had executed separate, identical wills with reciprocal provisions accompanied by an agreement that neither would change their wills after the death of the other, the wills would have been called (6) or (7). Because their will gave gifts of both real and personal property, it was technically known as a(n) (8). Gifts of real property in a will are called (9), and the people who receive them are known as (10). Gifts of personal property in a will are called either (11) or (12), and the people who receive them are known as (13). The will was not a(n) (14) will because it was not written in their handwriting, and it was not a(n) (15) will because it was not oral. Both Jonathan and Mable were in good mental health; therefore, they had (16) and were of (17). One year after executing the will, they decided to change it. They executed a new instrument that referred to the original will and made some changes in it. The new instrument, which was signed and witnessed in the presence of two competent witnesses, was called a(n) (18). Because it was properly executed, the new instrument had the effect of (19) the original will. Prior to their deaths, Jonathan and Mable intentionally tore up the will and codicil, effectively (20) them, and causing Jonathan and Mable to pass away (21).

**KEY TERMS**

- attest
- attestation
- bequeath
- bequest
- codicil
- decedent
- devise
- devisee
- devisor
- holographic will
- joint will
- legacy
- legatee
- legator
- mutual wills
- nuncupative wills
- probated
- proponent
- reciprocal wills
- republishing
- revoking
- sound mind
- subscribe
- testament
- testamentary capacity
- will