

**WILL EXECUTION CHECKLIST\***  
**FOR**

\_\_\_\_\_  
(Client's Name)

\_\_\_\_\_  
(Date of Execution)

\_\_\_\_\_  
(Responsible Attorney)

**I. PRE-EXECUTION**

**A. Check contents of will against drafting instructions.**

\_\_\_\_\_  
(Initialed by)

An outline or notes are used when drafting, but a review is advisable to ensure that absolutely nothing was omitted in the final draft.

**B. Check spelling of all names.**

The slightest error in spelling, omission of a "Jr.," an essential middle name or initial could conceivably change the beneficiary altogether. Short of that, it still provides an avenue for contest or confusion.

**C. Check relationship of legatees.**

By the time the will is offered for probate, the intended beneficiary's name or her relationship to the client may have changed, so it would be up to the court to determine the outcome. In *Breckheimer v. Kraft*,<sup>1</sup> Clara Johnson bequeathed her residuary estate equally to her "beloved nephew Raymond Schneikert and Mabel Schneikert his wife, of Plymouth, Wisconsin" in full knowledge that: Mabel was no longer his wife, was remarried and lived in Sheboygan, and Evelyn was Raymond's new wife. Did Aunt Clara intend to give to Mabel or to Evelyn? The Appellate Court decided in favor of the second Mrs. Schneikert, the reason being that on the date of the will there was no one named "Mabel Schneikert," but there was a person who answered the description "his wife, of Plymouth, Wisconsin."

**D. Check recital of domicile.**

The double domicile problem can result in successful attempts by two or more jurisdictions to impose death taxes on the client's estate.<sup>2</sup> It can also give rise to claims by one or more states for unpaid local income taxes or personal property taxes. Where this problem may exist, consideration should be given to carefully determining the client's domicile, or to making no recitation of domicile in the will.

<sup>1</sup> 133 Ill. App. 2d 410 (1st Dist. 1971).

<sup>2</sup> See *Kartiganer v. Koenig*, 194 A.D.2d 879, 881, 559 N.Y.S.2d 312 (3d Dep't 1993); *In re Estate of Gadway*, 123 A.D.2d 83, 510 N.Y.S.2d 737 (3d Dep't 1987); see also *In re Trowbridge's Estate*, 266 N.Y. 283 (1935).

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**E. Check descriptions of all specifically described property.** \_\_\_\_\_

An error in description of property could technically cause the client's bequest to bypass the intended beneficiary and go into the residuary estate. Omission of an important word could also alter things considerably. The dealer in antique glassware who leaves his rare antique crystal to his housekeeper is leaving something substantially more than what he intended when the word "ball" was omitted after crystal. In another instance, omission of a specific description of an item, or a more comprehensive disposition including splits and dividends of stock, might have led to less confusion.

**F. Check all amounts of dollar legacies.** \_\_\_\_\_

A typographical error in transcription is often apt to occur when dealing with numbers. Double check for accuracy.

**G. Check other documents referred to in will.** \_\_\_\_\_

If, for example, the client is the donee of a power of appointment which is being exercised, the donor's document should be checked to be sure of accurate references. Deeds to specifically devised real estate also should be checked to avoid any error in descriptions. If the will makes an addition to an existing trust, the description of that trust should be verified. Relevant dates on all pertinent documents mentioned in the will also should be double checked for accuracy.

**H. Check all internal cross-references.** \_\_\_\_\_

When reference is made to a particular article or section in another part of the document (e.g., ". . . pursuant to the provisions in Section C of ARTICLE TWO. . ."), that referred section should be checked to be sure it concurs. As drafting changes are made in the preparation of the document, the necessary changes in references easily can be overlooked.

**I. Check all powers of appointment being exercised to see that:**

**1. The rule against perpetuities is not violated.** \_\_\_\_\_

It is wise to re-check to see whether the permissible period from which the rule against perpetuities begins (a) is the effective date of the instrument of exercise, in the case of an instrument exercising a general power which is presently exercisable, or (b) is the time of the power's creation, as in all other cases. "Where the creator of a trust reserves to himself an unqualified power to revoke, the permissible period of the rule against perpetuities begins when the power to revoke terminates by reason of the death of the creator, by a release of such power or otherwise."<sup>3</sup> The measuring lives must be in existence at the creation of the power, i.e., at the commencement of the permissible period; it is not sufficient that the measuring lives are in existence at the execution of the power.<sup>4</sup>

<sup>3</sup> EPTL 10-8.1(b).

<sup>4</sup> EPTL 10-8.1(a).

**2. The appointees are within the permitted class.** \_\_\_\_\_

It is important to make sure that appointees are within the class permitted by the power. A “son and his issue” who are permitted appointees, in no way include his spouse, nor any of his issue’s spouses. “The donee of a power of appointment which is presently exercisable, or of a postponed power which has become exercisable, can contract to make an appointment to the extent that the contract or the promised appointment does not confer a benefit upon a person who is not a permissible appointee under the power.”<sup>5</sup> No other contracts to exercise are valid.<sup>6</sup>

**3. The formal requirements have been complied with.** \_\_\_\_\_

Unless the instrument creating the power provides that specific reference to it is necessary to its valid exercise, a power is exercised by: (1) declaring that the client is exercising all the powers he has; (2) disposing of appointive property by language which sufficiently identifies the same; (3) making a disposition which when read with reference to the property he owned and the circumstances existing at the date of execution manifests the client’s understanding that he was disposing of appointive property; or (4) disposing of all of the client’s property, or all of the property covered by the power (e.g., “all of my real property,” or “all of my personal property,” or “all of my stocks and bonds”), unless the intent not to exercise appears expressly or by necessary implication.<sup>7</sup>

“Necessary implication [against exercise] results only where the will admits of no other interpretation.”<sup>8</sup> Where, therefore, a power is not to be exercised, specific language to that effect should be included in the will. Also, since a client may be the donee of a power of appointment of which she is unaware, such a clause as this is insurance against inadvertent exercise of it, whether by statute or otherwise. Particularly where the power has been created outside the state, any powers which are to be exercised should be specifically referred to by appropriate language, since the validity of the exercise of powers over personal property is governed by the law of the donor’s domicile and real property by the law of the situs thereof.<sup>9</sup> To quote Durand in *Draftsmanship: Wills and Trusts*: “Old-fashioned residuary clauses disposing of the residuary estate, ‘including all property over which I may have the power of disposition by will or otherwise’ do not enjoy the endorsement of this committee.”<sup>10</sup>

**J. Check continuity.** \_\_\_\_\_

Be certain—especially in the event of pages being re-typed or re-printed—that the first word of each page follows logically in sequence to the last word of the previous page.

**K. Check article numbers, sections, subsections, etc.** \_\_\_\_\_

In like manner, double check order of letters, Roman numerals and numbers used within the document to denote headings.

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<sup>5</sup> EPTL 10-5.2.

<sup>6</sup> EPTL 10-5.3.

<sup>7</sup> EPTL 10-6.1.

<sup>8</sup> *Lockwood v. Mildeberger*, 159 N.Y. 181, 186 (1899); see *In re Deane’s Will*, 4 N.Y.2d 326, 175 N.Y.S.2d 21 (1958).

<sup>9</sup> *In re Fuller’s Will*, 131 N.Y.S.2d 402 (Sur. Ct., N.Y. Co. 1954); *In re Barnhart’s Will*, 137 Misc. 518, 244 N.Y.S. 130 (Sur. Ct., Niagara Co. 1930).

<sup>10</sup> 1957 Proceedings, Section on Real Property Probate and Trust Law, pp. 70, 77.

**L. Check page numbers.** \_\_\_\_\_

There is no statutory requirement that the pages of a will be numbered. However, it is most expedient to have them numbered consecutively, it also is desirable that they be in proper order.

**M. Check references to total pages on signature page.** \_\_\_\_\_

Again, good practice calls for the last page to contain a reference to the total number of pages contained in the document.

**N. Make certain that the signature line for the client appears on the same page as signature lines for witnesses.** \_\_\_\_\_

Signature lines for client and witnesses appearing on the same page avoids any possibility of a witness claiming that he did not see the client's signature on the will.

**O. Have out-of-state counsel check will, if applicable, and secure opinion.** \_\_\_\_\_

If the will is prepared for a resident of another state, or if it disposes of out-of-state real property, it may be advisable to consult counsel in the state whose laws will apply. As is true in nearly every state, there are various differences in acceptable format and wording which may not be spelled out in the statutes, but are nonetheless expected when the will is presented for probate.

**P. Check date on will.** \_\_\_\_\_

Although there is no statutory requirement in New York that a will be dated, it is a practice which is almost universally employed. Naturally, in the instance where more than one will has been executed, it is imperative that the dating be accurate.<sup>11</sup> With every will, however (particularly if prepared at the end of one year and executed in the early part of the new year), check the date.<sup>12</sup>

**Q. Send copy of proposed will to client-marked "COPY"** \_\_\_\_\_

The client should have ample time to review and check over a copy of the final document before the date is set for execution of the original. Any desired changes or corrections can then be relayed to the draftsman. Mark "COPY" on front and across signature line of proposed will draft, to avoid any possible confusion. (See III.E., below.)

**II. EXECUTION<sup>13</sup>**

**A. Explain will to client.** \_\_\_\_\_

Even though the client has had an opportunity to go over a copy of the final draft, good practice calls for counsel's careful explanation of how the client's wishes have been set forth

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<sup>11</sup> *In re Sniffin's Will*, 113 Misc. 307, 184 N.Y.S. 538 (Sur. Ct., Westchester Co. 1920); 57 Am. Jur., Wills, § 223.

<sup>12</sup> *In re Estate of Lyons*, 96 A.D.2d 617, 464 N.Y.S.2d 592 (3d Dep't 1983).

<sup>13</sup> As observed by Surr. Keane, in *In re Rounds' Will*, 47 Misc. 2d 877, 263 N.Y.S.2d 379 (Sur. Ct., Broome Co. 1965), "It is true that with the skilled and experienced attorney, the procedure followed in executing wills approximates a ceremony akin to a religious ritual, being ever unvarying."

in the document to be signed. This practice provides further proof that the client is familiar with the contents when asked later in the presence of the witnesses.

**B. Fasten will together securely and permanently.** \_\_\_\_\_

There is no statutory requirement that the pages be stapled, fastened, pinned or glued together in any particular manner. The caution is that the staples or other fasteners holding the will together should never be removed. A revision of a previously executed will should take the form of a codicil or a completely new will. Retaining some pages of the original, and substituting new pages for the ones which need revision is not invalid, *per se*, but will be apt to raise questions as to fraud in the execution, or may encourage the substitution of pages by another or by the client himself. The difference in age of the various pages, dissimilar type style or strength of impression, as well as the presence of multiple staple or other type of holes, would provide ample fuel for a will contest.<sup>14</sup>

**C. Decide what pen to use, and use throughout.** \_\_\_\_\_

This may be useful in evidencing the fact that the client and witnesses were all together when the will was signed. Safe procedure suggests that all signatures be made with the same pen.<sup>15</sup>

**D. Ask client to initial last word on each numbered page.** \_\_\_\_\_

As an additional safety precaution, experienced practitioners usually ask the client to initial the last word on each page, except the page on which his or her signature will appear. This practice makes more difficult substitution of spurious pages or addition of words at a later date.<sup>16</sup> It is also some slight evidence that the client turned each page of the document and had the opportunity to become familiar with the contents.

**E. Double check client's initialing of each page.** \_\_\_\_\_

Double check initialing merely as a precaution that no pages have been skipped.

**F. Ask in two, and preferably three, competent witnesses.** \_\_\_\_\_

EPTL 3-2.1(a)(4) requires that there must be at least two attesting witnesses. It is advisable, however, to have two witnesses plus the draftsman, so that if the client owns or acquires property in a state which requires three witnesses for probate, the will complies with the statute of that state.

In New York, there are no statutory requirements with regard to character or competency of an attesting witness to a will. EPTL 3-2.1(a)(1)(C) does provide that a person signing on behalf of the client cannot be one of the necessary witnesses. Similarly, EPTL 3-3.2 militates against a beneficiary being a necessary attesting witness in order to avoid a forfeiture of his or her interest under the will. Beyond these negative directions, however, the statute is silent.

Nevertheless, one may accurately gauge the probable requirements of a witness to a will. She should have the capacity to comprehend the task she is requested to perform. In light of the reduced age requirement for making a will, it is also probable that an individual 18 years or

<sup>14</sup> See, e.g., *In re O'Reilly's Will*, 109 N.Y.S.2d 437 (Sur. Ct., Kings Co. 1951); see also 39 N.Y. Jur. 2d *Decedents' Estates* § 571.

<sup>15</sup> See, e.g., *In re Lyons' Will*, 75 N.Y.S.2d 237 (Sur. Ct., Broome Co. 1947).

<sup>16</sup> See 38 N.Y. Jur. 2d *Decedents' Estates* § 412; Frederick K. Hoops, *Family Estate Planning Guide* § 17.32 (4th ed. 1994); W.W. Allen, Annotation, *Validity of Will Written on Disconnected Sheets*, 38 A.L.R.2d 477.

more would qualify. Asking anyone under that age would be open to serious question, although at least one case has upheld a will witnessed by a 16-year-old stenographer.<sup>17</sup>

Needless to say, a person who is afflicted with blindness,<sup>18</sup> who is deaf or otherwise impaired in his ability to view the document and communicate with the client should not be employed for this purpose.

The best witnesses are attorneys, or at least one, since there is then the presumption that the will was duly executed.<sup>19</sup> It is further recommended that business and professional men or women or other persons of like stability be selected. Such persons make more impressive witnesses in the event of a contest and are more stable under rigid cross-examination.<sup>20</sup> An executor or a trustee is not usually disqualified because of his or her interest in earning commissions,<sup>21</sup> nor is there any bar to the client's attorney, or other confidant acting as one of the necessary witnesses.

Under certain circumstances, counsel should anticipate a contest of the will. In such case, prudence dictates that at least one of the witnesses be the family physician. If the client is an adjudicated incompetent or is being treated for a mental illness, the advisability of selecting psychiatrists as subscribing witnesses should be considered.<sup>22</sup>

It is also possible to file the will in the surrogate's court.<sup>23</sup> It also has been suggested that a videotape of the proceedings be made at the time of execution. Remember, however, that any of these methods may create a prejudicial atmosphere, as in cases where transfers in contemplation of death are concerned and a similar right to perpetuate testimony exists.<sup>24</sup>

#### **G. Engage witnesses and client in conversation.**

A witness should be satisfied from his or her own knowledge that the client is of sound and disposing mind and memory. Therefore, engagement in conversation for several minutes permits the witnesses to form an opinion as to the client's mental competence.<sup>25</sup> A resume of the conversation should be made, not only to refresh the recollection of witnesses whose

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<sup>17</sup> *In re Estate of Tannenbaum*, 154 Misc. 828, 278 N.Y.S. 253 (Sur. Ct., N.Y. Co. 1935); see also 26A Carmody-Wait 2d § 152:226.

<sup>18</sup> *In re Losee's Will*, 13 Misc. 298, 34 N.Y.S. 1120 (Sur. Ct., Westchester Co. 1895); 18 N.Y. Jur. 2d *Decedents' Estates* § 471.

<sup>19</sup> *In re Estate of Huang*, 11 Misc. 3d 325, 811 N.Y.S.2d 885 (Sur. Ct., N.Y. Co. 2005); see *In re Rosen*, 291 A.D.2d 562, 737 N.Y.S.2d 656 (2d Dep't 2002); *In re Spinello*, 291 A.D.2d 406, 736 N.Y.S.2d 894 (2d Dep't 2002); *In re Estate of Murtlow*, 258 A.D.2d 686, 685 N.Y.S.2d 323 (3d Dep't 1999); *In re Tully*, 227 A.D.2d 288, 642 N.Y.S.2d 878 (1st Dep't 1996).

<sup>20</sup> E.L. Fingar, et al., *New York Wills and Trusts*, § 3.12 (3d ed. 1993).

<sup>21</sup> *In re Bitterman's Estate*, 203 Misc. 796, 118 N.Y.S.2d 859 (Sur. Ct., N.Y. Co. 1952), *aff'd*, 281 A.D. 1024, 122 N.Y.S.2d 622 (1st Dep't 1953). See W.R. Habeeb, Annotation, *Competency of Named Executor as Subscribing Witness to Will*, 74 A.L.R.2d 283.

<sup>22</sup> *In re Walther's Will*, 6 N.Y.2d 49, 188 N.Y.S.2d 168 (1959).

<sup>23</sup> SCPA 2507(1).

<sup>24</sup> Frederick K. Hoops, *Family Estate Planning Guide* § 17.32 (4th ed. 1994); W.W. Allen, Annotation, *Validity of Will Written on Disconnected Sheets*, 38 A.L.R.2d 477.

<sup>25</sup> See R.W. Gascoyne, Annotation, *Necessity of Laying Foundation for Opinion of Attesting Witness as to Mental Condition of Testator or Testatrix*, 17 A.L.R.3d 503; C.C. Marvel, Annotation, *Effect of Failure of Attesting Witness to Observe Testator's Capacity*, 69 A.L.R.2d 662.

familiarity with the client may be limited to the execution of the will, but also for its possible probative value in establishing testamentary capacity.

**H. Note who else is present during ceremony.** \_\_\_\_\_

Indication of others present—besides the client and witnesses—could provide a valuable aid in refuting any “undue influence” argument.<sup>26</sup>

**I. Request client to fill in date and time of execution on will.** \_\_\_\_\_

As a practical matter, a will should be dated,<sup>27</sup> especially if a new will is drawn, revoking all previous ones. Beyond this, the act of having the client determine and fill in the date and time is at least partial indication that he or she is of sound mind. The time is important if there are interrelated documents such as a revocable trust into which the will pours assets, or one spouse’s will exercising a power of appointment under the other spouse’s simultaneously executed will.<sup>28</sup>

**J. Make certain that client and witnesses initial any interlineations in addition to indicating such in the attestation clause.** \_\_\_\_\_

Every precaution should be taken against interlineations in pen or pencil on a typewritten will. From a purely procedural point of view, some courts will not accept affidavits from witnesses in lieu of an examination in person at the courthouse (even in uncontested cases) if interlineations appear on the face of the will. However, in unavoidable circumstances, when interlineations are a necessity, it is suggested that the client and witnesses initial any changes or additions in the body of the will before it is subscribed, as well as indicating at the end of the will and in the attestation clause that the testator executed the will after “having made the interlineations on page \_\_\_\_\_ herein.”<sup>29</sup> Any attachments, insertions or modifications of any sort made after due publication and execution do not constitute any part of the will.<sup>30</sup>

**K. Ask client to affix signature, or have signature affixed, to last page of original will only.** \_\_\_\_\_

EPTL 3-2.1(a)(1) states that the will “shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction.” Therefore, the client’s signature should be affixed to the last page of the original will immediately following the body or operative provisions and the testimonium clause, if one is used. The typing should be so arranged that some portion of the body of the will is on the signature page, so that the signature is never on a separate sheet.<sup>31</sup> The signature may be made by writing it out in full, by

<sup>26</sup> See Don F. Vaccaro, Annotation, *Solicitation of Testator to Make a Will or Specified Bequest as Undue Influence*, 48 A.L.R.3d 961.

<sup>27</sup> *In re Philip’s Estate*, 143 Misc. 77, 256 N.Y.S. 672 (Sur. Ct., Erie Co. 1932).

<sup>28</sup> *In re Adler*, N.Y.L.J., Dec. 12, 1967, p. 19, col. 7 (Sur. Ct., Kings Co.).

<sup>29</sup> See, e.g., *Crossman v. Crossman*, 95 N.Y. 145 (1884); *In re Schreiner’s Will*, 137 N.Y.S.2d 217 (Sur. Ct., Kings Co. 1954); *In re Estate of Tier*, 3 Misc. 3d 587, 772 N.Y.S.2d 500 (Sur. Ct., N.Y. Co. 2004). See also W.W. Allen, Annotation, *Interlineation and Changes Appearing on Face of Will*, 34 A.L.R.2d 619.

<sup>30</sup> *Estate of Hall*, 118 Misc. 2d 1052, 462 N.Y.S.2d 154 (Sur. Ct., Bronx Co. 1983); see, e.g., *In re Estate of Robbes*, 29 Misc. 2d 358, 211 N.Y.S.2d 830 (Sur. Ct., N.Y. Co. 1960); *In re Estate of Lewandowski*, 60 Misc. 2d 1005, 304 N.Y.S.2d 263 (Sur. Ct., Bronx Co. 1969); *In re Lyons’ Will*, 75 N.Y.S.2d 237 (Sur. Ct., Broome Co. 1947). See also EPTL 3-2.1(a)(1)(B).

<sup>31</sup> E.L. Fingar et al., *New York Wills and Trusts* § 3.08 (3d ed. 1993).

a mark,<sup>32</sup> by abbreviating it, by writing initials<sup>33</sup> or a given name, by a fingerprint,<sup>34</sup> or by using an assumed name where this is not done with an intent to deceive. Needless to say, where the client was literate, in good health and possessed all of his or her faculties, the use of a mark or less than a full-fledged signature will be viewed critically. The alternative available, particularly in the case where the client is weak or infirm, is to have someone assist the client in making his or her signature.<sup>35</sup>

Statements of the client to attesting and other witnesses at the time, indicating his or her desire for assistance, would be clearly helpful. This would bar any claim of coercion.

For the case where a client has someone sign for him or her, EPTL 3-2.1(a)(1) establishes detailed ground rules to be followed. The person so acting must be requested to do so by the client and must carry out the directive in the client's presence. Failure to establish the client's direction to the person signing, or failure to establish that the signing was done in the client's presence, may lead to a denial of probate. EPTL 3-2.1(a)(1)(C) further stipulates that one signing a testator's name for him cannot act as one of the two necessary witnesses, and must add her own name and address to the instrument. If, however, the client fails to affix his or her signature, in whatever form, to the "end of the will," the instrument will be denied probate.<sup>36</sup>

A seal is not requisite to a will of real or personal estate. The statute requires only that it be subscribed by the testator at the end. Where a will is executed under seal, the destruction of the seal by the testator effects a revocation of the will.<sup>37</sup>

**L. Ask client whether he or she publishes and declares this document to be his or her last will and testament.**

EPTL 3-2.1(a)(3) provides that "the testator shall, at some time during the ceremony . . . of execution . . . declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will." The object or purpose of the requirement of publication is to make known to each witness that the maker understands the character of the document he or she is executing, thereby preventing mistake, fraud or imposition. Compliance with the statutory requirement is satisfactorily shown by establishing that in some manner the client conveyed "to the minds of the witnesses his own present consciousness that the paper writing

<sup>32</sup> *In re Caffrey's Will*, 174 A.D. 398, 161 N.Y.S. 277 (1st Dep't 1916), *aff'd*, 221 N.Y. 486 (1917); *In re Estate of Leahy*, N.Y.L.J. Oct. 6, 1960, p. 14, col. 5 (Sur. Ct., Kings Co.).

<sup>33</sup> *Palmer v. Stephens*, 1 Denio 471 (N.Y. 1845).

<sup>34</sup> *See, e.g., In re Romaniw's Will*, 163 Misc. 481, 296 N.Y.S. 925 (Sur. Ct., Westchester Co. 1937); *In re Stegman's Will*, 133 Misc. 745, 234 N.Y.S. 239 (Sur. Ct., Oneida Co. 1929), *aff'd*, 227 A.D. 647, 235 N.Y.S. 890 (4th Dep't 1929); *In re Arcowsky's Will*, 171 Misc. 41, 11 N.Y.S.2d 853 (Sur. Ct., Kings Co. 1939).

<sup>35</sup> *In re Will of Bernatowicz*, 233 A.D.2d 838, 649 N.Y.S.2d 625 (4th Dep't 1996); *see, e.g., In re Bitzer's Will*, 124 Misc. 432, 208 N.Y.S. 824 (Sur. Ct., N.Y. Co. 1924); *In re Surak's Will*, 48 N.Y.S.2d 400 (Sur. Ct., Westchester Co. 1944); *In re Lewis' Estate*, 193 Misc. 183, 80 N.Y.S.2d 757 (Sur. Ct., Westchester Co. 1948); *In re Gallagher's Will*, 123 N.Y.S.2d 912 (Sur. Ct., Queens Co. 1953).

<sup>36</sup> *In re Zaharis' Estate*, 91 A.D.2d 737, 457 N.Y.S.2d 995 (3d Dep't 1982), *aff'd*, 59 N.Y.2d 629, 463 N.Y.S.2d 195 (1983); *In re Baumann's Will*, 85 Misc. 656, 148 N.Y.S. 1049 (Sur. Ct., Bronx Co. 1914); *see In re Uhl's Will*, 29 Misc. 2d 124, 218 N.Y.S.2d 225 (Sur. Ct., Westchester Co. 1961); *see also In re King's Will*, 16 A.D.2d 614, 226 N.Y.S.2d 239 (1st Dep't 1962); *In re Estate of Young*, 36 Misc. 2d 718, 233 N.Y.S.2d 922 (Sur. Ct., N.Y. Co. 1962).

<sup>37</sup> *In re Thompson's Estate*, 190 Misc. 760, 71 N.Y.S.2d 501 (Sur. Ct., N.Y. Co. 1947).

being executed is a will”; no formal words need be employed.<sup>38</sup> A statement by the attorney or other person assisting in the ceremony, in the hearing of the client and the witnesses, that the instrument being executed is a will, meets the requirements of the statute.<sup>39</sup>

In whatever manner publication is made, it is a “vital requisite” to valid execution in New York.<sup>40</sup> If the client requests the subscribing witnesses to witness his or her signature but fails to disclose to them the testamentary nature of the instrument, it does not constitute compliance with the mandate of the statute that a will be published as such.<sup>41</sup> Also, if the will is merely referred to as an “instrument” or a “paper” it does not comply with the statute and probate may not be granted.<sup>42</sup>

**M. Ask client whether she is familiar with the document’s content.** \_\_\_\_\_

**N. Ask client whether the document expresses his or her wishes.** \_\_\_\_\_

Ask the client whether he or she is familiar with the will and whether it expresses his or her wishes. This will establish the client’s knowledge of its contents and further substantiate the required publication.

**O. Ask client whether he or she requests the witnesses to:** \_\_\_\_\_

1. Act as witnesses to his or her will;
2. Sign his or her will as witnesses;
3. Execute an affidavit as to the circumstances of the execution of his will.

EPTL 3-2.1(a)(4) requires that each of the witnesses, at the request of the client, sign his or her name and affix his or her residence address at the end of the client’s will. (The statute then enigmatically states that the failure of a witness to affix his or her address shall not affect the validity of the will.) The optimum procedure, of course, is to consummate the will’s execution in one transaction, with the entire ceremony taking place in the joint presence of the client, draftsman, and witnesses. However, under EPTL 3-2.1(a)(2), a client is free to sign (or have signed) his or her will, and then to call in witnesses, at which point the client must acknowledge his or her signature, publish and declare the document to be his or her will, and request that they attest his or her signature and subscribe their names and residence addresses at the end.

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<sup>38</sup> *In re Will of Nevins*, 231 N.Y.S.2d 586 (Sur. Ct., Queens Co. 1962); *In re Estate of Pirozzi*, 238 A.D.2d 833, 657 N.Y.S.2d 112 (3d Dep’t 1997).

<sup>39</sup> *In re Frank*, 249 A.D.2d 893, 672 N.Y.S.2d 556 (4th Dep’t 1998); see *In re Voorhis’ Will*, 125 N.Y. 765 (1891).

<sup>40</sup> *In re Dodds’ Will*, 294 N.Y. 706 (1945); *In re Will of Schwartz*, 22 Misc. 2d 392, 197 N.Y.S.2d 914 (Sur. Ct., Westchester Co. 1960). See Wade R. Habeeb, Annotation, *Wills: Necessity that Attesting Witnesses Realize Instrument was Intended as Will*, 71 A.L.R.3d 877.

<sup>41</sup> *In re Pulvermacher’s Will*, 305 N.Y. 378, *aff’d*, 305 N.Y. 923 (1953).

<sup>42</sup> *In re Roberts*, 215 A.D.2d 666, 628 N.Y.S.2d 500 (2d Dep’t 1995).

**P. Have counsel, as first witness:** \_\_\_\_\_

1. Sign will and indicate place of residence;<sup>43</sup>
2. Complete and execute affidavit.

**Q. Have second witness:** \_\_\_\_\_

1. Sign will and indicate place of residence;
2. Execute affidavit.

**R. Have third witness:** \_\_\_\_\_

1. Sign will and indicate place of residence;
2. Execute affidavit.

It is absolutely essential that the testator's signature itself must have been visible to each of the witnesses.<sup>44</sup> It is not a prerequisite that the witnesses actually inspect the signature, and there is no additional requirement that they have a familiarity with the signature so as to be sure of its genuineness. The acknowledgment of the visible signature is all that is required.<sup>45</sup> Thus, for example, an acknowledgment is defective if the signed will is in a sealed envelope, or if the testator conceals the signature from view while making the acknowledgment.

**S. Have affidavit notarized.** \_\_\_\_\_

Section 1406(1) of the Surrogate's Court Procedure Act provides that: "In addition to other procedures prescribed for the proof of wills, any or all of the attesting witnesses to a will may at the request of the executor . . . make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint. The sworn statement of a witness so taken shall be accepted by the court as though it had been taken before the court." The statute is intended to reduce the expense and inconvenience involved in uncontested probate proceedings.

**T. Complete date on will back.** \_\_\_\_\_

Although month and year are usually typed in ahead of time, the day on which a will is to be executed is always subject to change. After completion of the execution, be certain that the accurate date is placed on the will back.

Estates, Powers and Trusts Law § 3-2.1(a)(4) requires that the witnesses must attest to the testator's or testatrix's signature within 30 days. The 30-day period marks only the outer limit of the process, and the court is free to find the continuity interrupted after the lapse of a shorter

<sup>43</sup> C.P. Jhong, Annotation, *Wills: Place of Signature of Attesting Witness*, 17 A.L.R.3d 705.

<sup>44</sup> *In re Mackay's Will*, 110 N.Y. 611 (1888); *In re Redway's Will*, 238 A.D. 653, 265 N.Y.S. 848 (3d Dep't 1933), *aff'd*, 265 N.Y. 519 (1934).

<sup>45</sup> *In re Estate of Levy*, 169 A.D.2d 923, 564 N.Y.S.2d 642 (3d Dep't 1991); see *In re Levine's Will*, 2 N.Y.2d 757, 157 N.Y.S.2d 577 (1956).

span of time.<sup>46</sup> Where circumstances necessitate a piecemeal process of execution and attestation, one runs the risk of conflicting testimony and lack of otherwise available corroboration. Also, as most jurisdictions require the execution to be completed in a single ceremony with all witnesses present, it is strongly suggested that this method be employed.

**U. Excuse witnesses.** \_\_\_\_\_

The due execution of the will in the presence of witnesses now being completed, there is no further need or requirement that they remain.

**III. POST-EXECUTION**

**A. If any life insurance policies are made payable to trustees under the will, execute beneficiary designation.** \_\_\_\_\_

In the case where a trust is created under the will and life insurance policies are to be made payable to the trustees, it is advisable that the client execute the necessary change of beneficiary forms immediately after the will is executed.<sup>47</sup>

**B. Execute any letters to executors, trustees or legatees explaining client's intentions or desires.** \_\_\_\_\_

The execution of letters to executors, trustees or legatees explaining the client's intentions or desires is optional, and depends primarily upon the nature of the intentions. If anything beyond the ordinary or suggestive of possible future question is involved, it is wise to make it known and explained in writing at the time the will is signed.<sup>48</sup>

**C. Advise client where original will should be kept.** \_\_\_\_\_

One of the most widely held misconceptions concerning wills deals with where the original will should be kept. The client's safe deposit box clearly is not the answer, and many people are unaware of the reasons why it is not.<sup>49</sup> In many jurisdictions the death of the holder of a safe deposit box results in the box being sealed until the executor qualifies, which makes the whole procedure quite unattractive. Therefore, filing of the will with the surrogate's court for safekeeping, depositing it with a bank which has its own vault for the safekeeping of such documents, or entrusting the attorney or law firm with the original will are the best options.

**D. Obtain addresses of legatees and heirs, distributees or next-of-kin, if not previously done.** \_\_\_\_\_

In cases where there are many legatees and heirs, and rather remote in distance or relation, it saves a great deal of time-consuming search if addresses are obtained at the time the will is executed.

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<sup>46</sup> For discussion of the 30-day rule, see Warren's Heaton on Surrogates' Courts § 30.06(1)(b); E.L. Fingar, et al., *New York Wills and Trusts*, § 3.07 (3d ed. 1993).

<sup>47</sup> See Wanda Ellen Wakefield, Annotation, *Effectiveness of Change of Named Beneficiary of Life or Accident Insurance Policy by Will*, 25 A.L.R.4th 1164.

<sup>48</sup> Frederick K. Hoops, *Family Estate Planning Guide* § 17.33 (4th ed. 1994); W.W. Allen, Annotation, *Validity of a Will Written on Disconnected Sheets*, 38 A.L.R.2d 477.

<sup>49</sup> See Christopher H. Hall, Annotation, *Sufficiency of Evidence of Nonrevocation of Lost Will Not Shown to Have Been Inaccessible to Testator—Modern Cases*, 70 A.L.R.4th 323; John P. Ludington, Annotation, *Sufficiency of Evidence That Will Was Not Accessible to Testator for Destruction, in Proceeding to Establish Lost Will*, 86 A.L.R.3d 980.

**E. Conform copies of will:**

1. One for the client's records;
2. One for counsel's file;
3. Others requested by client.

Only one original of a will should be executed. The practice of executing wills in duplicate or multiplicate is fraught with danger. The loss of one of several executed copies of a will creates a presumption which prevents the probate of the will in the absence of direct proof to the contrary. If one of the executed copies was in the possession of the client, the failure to produce that copy, even though all others are produced, operates to create the presumption that the client revoked the *will anima revocandi*.<sup>50</sup> The burden of proving that this is not the fact is upon the proponent. The draftsman who causes wills to be executed in multiplicate therefore increases hazards and possible burdens for the proponent. Considering these ramifications, conform two copies of each of the original will and affidavit, one copy for the client and one for the counsel's file.

In some instances, additional conformed copies may be requested by the client for the files of his or her insurance agent, accountant or trust officer, for example, especially in the case where there is an interrelated document such as a revocable trust and a pour-over will is employed. The trustees of the revocable trust should have a conformed copy of the will.

**F. Determine whether to retain old will in file or destroy.**

Whether to destroy a client's prior wills depends to a large extent upon whether such wills are substantially in harmony with the one most recently exercised. If the will most recent in point of time is not admitted to probate, prior wills may be offered for probate in the inverse order of the execution. An inspection of such prior wills may well satisfy the proposed contestants of the futility of a contest and thus obviate expensive litigation.

There is nothing quite so discouraging to persons who contemplate an attack on a will as to discover that there are a number of wills prior to the one offered for probate in which the proposed contestant is either not mentioned or receives less than under the current will. On the other hand, if there are substantial changes from former wills, it may be better to destroy such wills, since saving them affords a legatee disinherited by a later will the opportunity to contest. The client must determine whether, in the event of destruction of prior wills, he or she would prefer intestacy if the last will is not admitted to probate.<sup>51</sup>

**G. Deliver original will to agreed-upon place of deposit.**

It is customary practice for counsel to handle the details of delivering the original will to the agreed-upon place of deposit. An accompanying letter should provide the necessary information, along with the request for a receipt that the document now is in safekeeping. If feasible, the document and accompanying letter should be sent by messenger, with the

<sup>50</sup> Harold D. Klipstein, *Drafting New York Wills*, § 3.12 (3d ed. 2001). See F.G. Madara, Annotation, *Destruction or Cancellation of One Copy of a Will Executed in Duplicate, as Revocation of Other Copy*, 17 A.L.R.2d 805.

<sup>51</sup> Harold D. Klipstein, *Drafting New York Wills*, § 68 (3d ed. 2001); D.E. Evins, Annotation, *Admissibility, on Issue of Testamentary Capacity, of Previously Executed Wills*, 89 A.L.R.2d 177.

envelope marked "Original Will—Handle as Vault Item." If the place of safekeeping is some considerable distance, the document should be sent via registered mail.

**H. Send "received" receipt to client.** \_\_\_\_\_

A copy of the "received" notice from the place of safekeeping should be photocopied for counsel's file, and the original sent on to the client.

**I. Send letter from counsel summarizing circumstances of execution.** \_\_\_\_\_

After every detail has been attended to, counsel should then send a letter to the client summarizing all circumstances of the due execution of the will. If the client required assistance in making his or her signature, for example, all pertinent information surrounding the assist can be precisely put forth. A file copy of a letter of this nature could be invaluable in refuting a later contest to the validity of the signature. Even with a less extreme case, a summarizing letter from counsel can be insurance well worth the time spent. It will show that counsel complied with the statute in every respect as to the will's due execution.<sup>52</sup>

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<sup>52</sup> *In re Estate of Voice*, 38 Misc. 2d 779, 238 N.Y.S.2d 736 (Sur. Ct., N.Y. Co.), *aff'd sub nom. In re Tolstoi*, 19 A.D.2d 945, 245 N.Y.S.2d 310 (1st Dep't 1963).

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