CHAPTER 20

EXECUTING AND SAFEKEEPING DOCUMENTS

20.1 REVIEWING DOCUMENTS

20.101 Review by Client. Drafts of the will and other proposed estate planning documents should be sent to the client for review before execution. A transmittal letter and a chart summarizing the key points discussed by the client and the attorney and reflected in the document drafts may be useful to both the attorney and the client. This procedure helps establish that the client knows and understands the content of the documents. The procedure can also prevent last-minute document changes and misspellings. The document drafts should be clearly marked "Draft" on at least the first page and through the signature lines of the documents, and the transmittal letter should make it clear that the enclosed documents are merely drafts and are not intended for execution by the client. The attorney should keep in the client's file copies of prior drafts that reflect significant discussion points or changes made during the drafting process.

20.102 Review by Corporate or Other Professional Fiduciary. If a trust company or bank or a professional individual is named as a fiduciary (either primary or contingent executor or trustee), a draft of the documents should be sent to the institution or professional for review before execution. This may be done after the client has had the opportunity to review the first draft of the documents and to ask questions. The attorney should be sure that the institution or professional is willing and able to administer the documents as drafted and that any fee arrangement between the client and the institution or professional has been discussed between them, with appropriate language inserted in the documents.

20.103 Word Processing Review. Before execution, the documents should be reviewed once more for accuracy. Although word processing equipment, particularly spell check and grammar check features, has made this job easier, it is still important to double-check the documents one more time. Human error or equipment failure may cause various last-minute mistakes in the documents, such as dropping a line or paragraph, misnumbering section numbers, and the like.

20.2 EXECUTION OF WILLS

Virginia law requires that the testator have legal capacity and that certain mechanics of execution be followed in order to create a valid will. To have legal capacity, the testator must be a person who is authorized under Virginia law to sign a will and who has the necessary testamentary capacity and intent. It is important to understand the distinction between testamentary capacity and testamentary intent and to be sure that *both* exist at the time the will is signed. Section 64.2-401 of the Virginia Code states that any person may make a will unless prohibited from doing so under subsection (B) of that section. There are two types of persons who cannot make a will: (i) those under the age of 18, and (ii) those of unsound mind. The Code does not define "unsound mind," but case law has provided some guidance on this matter.[1]

The requirements for execution of a will are detailed in section 64.2-403 of the Virginia Code. The requirements of this statute must be strictly followed, as its purpose is to provide all necessary safeguards for a testator while performing the important act of signing a will and to prevent the later production of a fraudulent will instead of the real will.[2] It is advisable for the testator to sign the will first, followed by the witnesses, although some cases have held that the order of signing is immaterial where the execution transaction is one continuous act.[3] If documents other than the will are being signed, the attorney should determine ahead of time the proper order for signing all of the documents. For example, if the will "pours over" assets to a separate trust, that trust agreement should be executed first.[4] The attorney must plan ahead to coordinate the signatures of the trustees.

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[1] *See, e.g., Fields v. Fields*, 255 Va. 546, 499 S.E.2d 826 (1998).

[2] Section 64.2-404 provides that even if a document (or a writing added to a document) was not executed in compliance with section 64.2-403, the document or writing must be treated as if it had been executed in compliance with section 64.2-403 "if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (i) the decedent's will; (ii) a partial or complete revocation of the will; (iii) an addition to or an alteration of the will; or (iv) a partial or complete revival of his or her formerly revoked will or of a formerly revoked portion of the will."

Section 64.2-404 further provides: "The remedy granted by this section: (i) may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will or a person signs the self-proving certificate to a will instead of signing the will itself; and (ii) is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death, and in which all interested persons are made parties."

[3] *See, e.g., Rosser v. Franklin*, 47 Va. (6 Gratt.) 1 (1849).

[4] *See* Va. Code § 64.2-426, -427.

If a will is not wholly in the testator's handwriting, Virginia law requires that *either* the testator's signature should be made in the presence of two competent witnesses present at the same time *or* the testator must acknowledge the will in the presence of at least two competent witnesses present at the same time.[5] The witnesses should then "subscribe" the will in the testator's presence.[6] It is possible (but *not* recommended) to satisfy this requirement by having the testator execute the will one day and acknowledge it before two competent witnesses together, who then subscribe the will the next day. The better approach is to have the testator sign his or her name in the presence of those witnesses. The legal requirement is that at least two *competent* witnesses be present at the same time.[7] A competent witness is a person who, at the time of making the attestation, "was qualified to testify in court to facts which he attests by subscribing his name to the will."[8]

Even though a person may have an interest in the will or the estate of a testator, he or she is still competent to testify for or against the will.[9] In addition, a person designated as executor under a will may still be a competent witness.[10] Although an interested party is technically a competent witness, it is still better practice to use disinterested witnesses whenever possible, especially if one beneficiary is getting preferred treatment under the will. If a witness has an interest, this may affect his or her credibility as a witness in a subsequent court hearing involving the validity or interpretation of the will.

As a practical matter, many of the problems associated with proving the proper execution of a will at probate have been remedied by the use of self-proved wills and the self-proving affidavit under sections 64.2-452 and 64.2-453 of the Virginia Code. These sections set out the steps for creating a self-proved will and should be followed carefully.

[5] Va. Code § 64.2-403(C).

[6] *Id.*; *see French v. Beville*, 191 Va. 842, 62 S.E.2d 883 (1951).

[7] Va. Code § 64.2-403(C).

[8] *Ferguson v. Ferguson*, 187 Va. 581, 591, 47 S.E.2d 346, 351 (1948).

[9] Va. Code § 64.2-405; *see also* Va. Code § 8.01-396 (a person is not incompetent to testify by reason of interest or because he or she is a party to any civil action).

[10] *Salyers v. Salyers*, 186 Va. 927, 45 S.E.2d 481 (1947).

20.3 EXECUTION OF OTHER ESTATE PLANNING DOCUMENTS

20.301 Trusts. Generally, the execution of a trust agreement requires the grantor and the trustee to sign the original document in the presence of a notary. If a schedule is attached identifying the initial assets of the trust, the parties should sign or initial the schedule. If a check or cash is changing hands between the grantor and trustee, this should be taken care of at signature time. In addition, the parties should take care of, or be made aware of, their other potential responsibilities associated with the new trust agreement, if applicable, such as sending notification letters to the beneficiaries, securing a tax identification number, establishing a bank account for the trust, and completing any changes of beneficiary forms for assets that may later be payable to the trust.

20.302 Powers of Attorney. The client must sign the original of the power of attorney in the presence of a notary. Virginia law does not require witnesses to a power of attorney, but the attorney should be aware that some states do have such a requirement, especially in cases where the client is known to have property outside of Virginia.

20.303 Advance Medical Directives. The client must sign the original in the presence of two witnesses.[11] While the law does not require notarization, it may be good practice to include it (especially if it is easy to do so where the client is signing other documents requiring notarization), since the document may eventually be used in a state where a notary's seal is required on such a document.

20.304 Anatomical Gift Forms. If the client wishes to donate his or her organs or body after death and has not already filled out the paperwork, the client may wish to either get a replacement driver's license that indicates the client's desire to be an organ donor or execute the anatomical gift form from the anatomical division of the Virginia Department of Health.[12]

20.4 SAFEKEEPING OF THE DOCUMENTS

There are several alternatives for the safekeeping of executed documents. Regardless of which place is selected by the client, it is important

[11] Va. Code § 54.1-2983.

[12] *See* Va. Code §§ 32.1-291.5 (how to make anatomical gifts), 46.2-342 (Department of Motor Vehicles' mandate to establish procedures for documenting such gifts). For Department of Motor Vehicles' requirements for organ donations, see www.dmv.virginia.gov/drivers/#organs.asp.

to make a notation in the client's file and by written confirmation to the client as to where the documents are kept. The considerations vary depending on the type of documents involved, such as wills, trusts, tangibles memoranda, powers of attorney, and advance medical directives.

20.401 Client's Safe Deposit Box. If a client has a bank safe-deposit box, this may be an appropriate place to keep the client's executed will. This keeps the documents safe from fire, other casualty, theft, or tampering. Although the laws of other states may make access difficult, Virginia law provides that any interested person may have access to a safe-deposit box for the limited purpose of looking for the will.[13]

20.402 Attorney Safekeeping. If the attorney has agreed to keep the original documents for a client, the attorney must take care that the documents are in a safe place, and it is generally better to use a commercial bank vault than a fireproof file cabinet or box in the law firm office. Access to the safe-deposit box should be limited to only a few law firm attorneys and key staff personnel. If the attorney agrees to keep clients' original documents, he or she is held to the standard of care imposed on a professional fiduciary.

20.403 Corporate Fiduciary. If a corporate fiduciary is named in the documents, typically the corporate or professional fiduciary agrees to hold the original documents (or at least the original will or trust agreement) for safekeeping. In this case, the attorney should get the prior approval of the client and then document that the originals have been sent to the corporate or professional fiduciary with a copy to the client.

20.404 Clerk of Court. Section 64.2-409(A) of the Virginia Code provides that "[a] person or his attorney may, during the person's lifetime, lodge for safekeeping with the clerk of the circuit court serving the jurisdiction where the person resides any will executed by such person." However, this statute is seldom used and requires that the clerk's office be authorized to perform will-filing services by order of the judges of that court, and not all circuit court clerk's offices in Virginia are set up to offer this service.[14]

20.405 Originals and Copies of Instruments. The testator should sign only the original of the will and generally only the original of the trust agreements. The attorney should provide the testator with photocopies of the

[13] Va. Code § 6.2-2302.

[14] *See* Va. Code § 64.2-409(F).

documents clearly marked "copy," preferably stamped at the top of the documents as well as through the signature lines toward the end of the documents.

Unless the attorney is aware of a specific reason that duplicate originals of a power of attorney may be required, it is generally better to have one original from which copies are made and stamped "copy." With one original, it is easier to deal with its revocation at a later date, should the principal so decide, than if there are numerous duplicate originals. It is often possible to include with a copy of the power of attorney a certification of the agent that the copy is a true copy, that the power of attorney has not been revoked, etc.[15] If the need arises later for the production of an original document, the original power of attorney can then be filed at the clerk's office of the appropriate circuit court, and certified copies of the recorded document (which generally satisfies anyone asking for an "original" power of attorney for his or her file) can be obtained from the clerk for a nominal cost.

Unless the attorney is aware of a specific reason why duplicate originals of an advance medical directive are required, usually one original directive is executed from which copies are made. Generally, a client will want to give a copy to his or her family doctor and specialists, to be made part of his or her medical files, and the client should have a copy available to take to the hospital if he or she is going to be admitted for any reason.

20.406 Destruction of Prior Originals. Generally, the client should be advised to destroy any prior original wills he or she possesses. The attorney may want to advise the client to bring any prior wills to the meeting where the new documents are to be signed, so that the testator can destroy the old documents in the presence of the witnesses. Only the testator should destroy his or her prior documents. Obviously, if the document being signed is simply a codicil, the attorney should stress to the client the importance of keeping all of the originals together. If the prior originals are located with a corporate fiduciary or attorney who is not going to continue to be an active part of the client's estate plan, the attorney should consider sending a letter to the prior attorney or corporate fiduciary to retrieve the original documents.

20.5 TERMINATING THE REPRESENTATION

After the attorney has drafted the estate planning documents and the client has executed them, the attorney must take some important final steps

[15] *See* Va. Code § 64.2-1639.