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Execution and Safekeeping of Documents

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13-1 OVERVIEW

When it is time for the execution of the will and other estate planning documents, the attorney should be sure that all legal requirements for the execution are satisfied and documented. This chapter reviews the legal requirements for the execution of a will and some practical considerations regarding the safekeeping of the newly signed documents. In addition to wills, there are references throughout this chapter to the execution and safekeeping of related documents such as trusts, powers of attorney,2 and advance directives for health care.3 This chapter also provides an overview of the various legal and ethical issues surrounding the capacity of the client.

13-2 REVIEW OF DOCUMENTS BEFORE EXECUTION

13-2.1 By Client

Drafts of the will and other proposed estate planning documents should be sent to the client for review before execution. If possible, the transmittal letter may contain a chart or written summary of the key points discussed by the client and the attorney that are reflected in the draft documents. This procedure helps establish that the client knows and understands the content of the documents and may 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 may want to keep in the client’s file copies of prior drafts that reflect significant discussion points or changes made during the drafting process.

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1. This chapter was originally written by Jeffrey C. Wolken, Esq., and updated for the 2006 edition by Michael S. Warner, Esq. Thomas A. Boulden, Esq., updated this chapter for the 2012 edition. Thomas A. Boulden, Esq., Kevin D. Birkhead, Esq., and Amanda M. Kita, Esq., revised the chapter for the 2016 edition.

2. See chapter 56 of the Probate, Estates and Fiduciaries Code. Throughout this chapter, reference will be made to this code as the “PEF Code,” which is found in Title 20 of the Pennsylvania Consolidated Statutes.

3. See chapter 54 of the PEF Code.
13-2.2 By Corporate or Professional Fiduciary

If a trust company or bank or a professional individual is named as a fiduciary (either primary or contingent executor or trustee), the attorney drafting the documents should determine whether it is appropriate to send a draft of the documents 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, ask questions, and consent to the distribution of the client’s draft documents to the designated third party. Prior to the execution of the documents naming a corporate or professional fiduciary, the attorney should consider whether the designated corporate or professional fiduciary is willing and able to administer the documents as drafted. Corporate fiduciaries often have standard language they expect to see in documents they are asked to administer. The attorney should review the proposed corporate fiduciaries boilerplate language to see if changes should be made to protect or benefit the client. Moreover, any fee arrangement between the client and the designated fiduciary should be discussed so that appropriate language that memorializes the agreement of the parties may be inserted into the documents.

13-2.3 By Attorney

The attorney should review all execution copies of estate planning documents one final time before execution to check for accuracy and inadvertent insertions or deletions. Although word processing equipment and software, particularly spelling check and grammar check features, have made this process 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, or altering page or section numbers.

13-3 LEGAL REQUIREMENTS FOR EXECUTION OF A WILL

13-3.1 Legal Capacity of the Testator

13-3.1.1 In General

Pennsylvania law requires that the testator have the legal capacity to make a will and that certain mechanics of execution are followed in order for there to be a valid will.

13-3.1.2 Capacity to Make a Will

Section 2501 of the PEF Code states that any person 18 or more years of age who is of sound mind may make a will.

13-3.1.3 Testamentary Capacity

13-3.1.3.1 In General

The initial presumption is that a person has testamentary capacity. A person does not have the testamentary capacity (mental competency) to make a will if he or she is not of sound mind. The PEF Code does not define “sound mind,” but case law has provided some guidance on this matter.

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4. Simply naming a corporate or professional fiduciary does not provide the attorney with the client’s consent for the disclosure of their confidential information to the designated fiduciary. The attorney must remember who they represent and obtain the client’s permission before they forward the estate planning documents to the designated fiduciary.

5. See section 13-3.1.3 for a discussion of testamentary capacity.

13-3.1.3 Testamentary Capacity

The test for capacity requires the testator to know certain things at the time he or she executes the will. Basically, a testator is deemed to have capacity to make a valid will if the testator has an intelligent knowledge of (1) what property he or she possesses, (2) which people are the natural objects of his or her bounty, and (3) what he or she desires to do with his or her property. In cases of marginal testamentary capacity, there are some special safeguards to take at the time of document execution.

[A] decedent possesses testamentary capacity “... if he has an intelligent knowledge regarding those who are the natural objects of his bounty, of what his estate consists, and of what he desires done with it, even though his memory has been impaired by age or disease”, and ... strong testimony is required to overcome evidence of competency given by the scrivener, subscribing witnesses and the attending physician.

13-3.1.3.2 Timing of Requirement of Testamentary Capacity

Testamentary capacity is only required at the moment the will is executed. As long as the testator is of sound mind at the time of execution, the testator's capacity before or after the execution of the will is immaterial.

13-3.1.3.3 Specific Factors

a. Old Age. The age of the testator does not, in and of itself, make the testator ineligible to make a will.

[N]either old age, nor its infirmities, including untidy habits, partial loss of memory, inability to recognize acquaintances, and incoherent speech, would deprive the testator of the right to dispose of [the testator's] own property.

b. Eccentric Behavior. Eccentric behavior or character is also not inconsistent with testamentary capacity.

c. Sickness or Mental Distress. Illness or emotional distress of the testator does not render the testator incapable of making a will.

d. Guardianship. A person is not necessarily incapable of making a will even if he or she is not able to handle other business affairs and there is a court-appointed guardian, or a competency hearing is pending, at the time the will is signed. The general rule is that the record of proceedings for the appointment of a guardian is relevant evidence to be weighed with other evidence in determining testamentary capacity. Even if a person has been adjudged in-

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7. See, e.g., Tetlow's Estate 112 A. 758 (Pa. 1921); Ash Will, 41 A.2d 620 (Pa. 1945); Williams v. McCarroll, 97 A.2d 14 (Pa. 1953).
8. See section 13-5.4.8 in this chapter.
14. See id. Moreover, the orphans' court may, upon petition and with notice to all parties in interest and for good cause shown, allow a guardian to make gifts, execute a disclaimer, establish a burial fund, or perform other estate planning functions on behalf of the incapacitated party. See 20 Pa.C.S. § 5536(b).
capacitated, he or she may still be capable of making a will.\textsuperscript{16} The proponent of the will executed when the testator or testatrix was incapacitated has the burden of presenting clear and convincing evidence that the testator or testatrix had capacity at the time of execution.\textsuperscript{17}

\textbf{13-3.1.3.4 Burden of Proof}

The burden of proving the absence of testamentary capacity is on the contestant, who must prove this in a positive and not doubtful manner.\textsuperscript{18} The proponent becomes entitled to a presumption of testamentary capacity by proof of execution by two witnesses.\textsuperscript{19} Once the presumption has been established, the contestant must proffer evidence to overcome the presumption.\textsuperscript{20}

\textbf{13-3.1.3.5 Comparison of Capacity Standards for Various Types of Legal Documents}

\textit{a. In General.} Technically, there are different legal standards applied for determining capacity depending on the type of document signed, although in practice judges and juries may not appreciate these subtle differences.

\textit{b. Trust Agreement.} The traditional rule for capacity to execute a trust is that the person creating the trust must have the legal capacity to convey the underlying property involved.\textsuperscript{21}

\textit{c. Deed.} A person is competent to execute a deed if he or she can understand the nature of the intended transaction and assents to its provisions.\textsuperscript{22}

\textit{d. Contract.} A person must understand the nature and consequences of his or her act at the time of the contract transaction and must not be impaired by reason of mental illness or defect to such an extent that the person cannot act in a reasonable manner in relation to the transaction, or else the contract may be voidable.\textsuperscript{23}

\textbf{13-3.1.3.6 Ethical Considerations in Dealing with a Marginal Testator}

\textit{a. In General.} An attorney assisting a client with marginal capacity may face several ethical issues arising from different parts of the Rules of Professional Conduct.\textsuperscript{24}

\textit{b. Client’s Capacity to Seek Representation.} With an individual who may be legally incapacitated, it is often such individual’s friend or a family member who will initiate the estate planning process. In an effort to help avoid the expense and other complications of some type of judicial determination of lack of capacity (i.e., a guardianship proceeding), the attorney may be asked to prepare documents that achieve what the family member or friend determines are the

\begin{thebibliography}{99}
\item[22] \textit{See Hamilton v. Fay}, 128 A. 837 (Pa. 1925) (“in the absence of fraud or undue influence [neither of which is present in the instant case], mere weakness of intellect, resulting from sickness or old age, is no ground for avoiding a deed if sufficient intelligence remains to comprehend the transaction”).
\item[23] See, e.g., John D. Calamari and Joseph M. Perillo, \textit{The Law of Contracts} § 8-10 (3d ed. 1987); see also Arthur C. Walsh, \textit{Mental Competency: Legal and Medical Aspects of Assessment and Treatment} (2d ed. 1994).
\end{thebibliography}
e. **Conflict of Interest.** Before the documents are signed, the attorney should have talked with the testator without anyone else present. The attorney needs to separate himself or herself from the primary beneficiaries, so that there is no question that the testator is the client.

f. **Notes and Records.** The scrivener of the documents and the attorney who supervises the execution of the documents should take care to make notes of the execution. It is the duty of the scrivener to be ready to support the desire of the testator to make his or her intended disposition. A common lament among counsel who try will contests is the lack of notes in the scrivener’s file. Remember that the scrivener and subscribing witnesses are considered the court’s witnesses for the purposes of a will contest.

### 13-3.1.3.7 Comparison of Challenge to Testamentary Capacity With Claim of Undue Influence

A determination of lack of testamentary capacity should be distinguished from a challenge to a will on the basis of undue influence. Testamentary capacity is a very low threshold and is discussed in detail above at section 13-3.1.3. Without testamentary capacity, the execution of a will

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29. See section 13-3.1.4.8 for further discussion of obtaining a doctor’s opinion.

30. See 45 CFR 164.502 and the medical information privacy law and regulations generally referred to as HIPAA.

31. See chapter 2 in this book regarding ethical issues in determining who the client is in estate planning work. See section 13-3.4.8 for practical steps to take at the time of document execution with a marginal testator.

is a void act and the resulting will is invalid. However, a will or a portion of a will may be set aside due to undue influence even when an individual possessed testamentary capacity when he or she executed his or her will.

Most will contests in Pennsylvania are based in part on a claim of undue influence. The leading case setting out the requirements to establish undue influence is *Estate of Clark*. The tripartite test set forth in *Clark* requires the contestant to prove each of the three prongs of the test by clear and convincing evidence. The three-part test requires proof of (1) the weakened intellect of the testator/testatrix, (2) a confidential relationship between the proponent of the will and the testator/testatrix, and (3) a substantial benefit for the proponent of the will.

### 13-3.2 Statutory Requirements for Execution of Will

#### 13-3.2.1 Signing

Section 2502 of the PEF Code states that:

Every will shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

1. **Words following signature.**—The presence of any writing after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature.

2. **Signature by mark.**—If the testator is unable to sign his name for any reason, a will to which he makes his mark and to which his name is subscribed before or after he makes his mark shall be as valid as though he had signed his name thereto: Provided, he makes his mark in the presence of two witnesses who sign their names to the will in his presence.

3. **Signature by another.**—If the testator is unable to sign his name or to make his mark for any reason, a will to which his name is subscribed in his presence and by his express direction shall be as valid as though he had signed his name thereto: Provided, he declares the instrument to be his will in the presence of two witnesses who sign their names to it in his presence.

#### 13-3.2.2 Location of Signature

As described above, it is essential that the signature be located at the end of the will.

#### 13-3.2.3 Signature by Mark

As described above, a testator may execute a will by making his or her mark as long as the testator’s name is subscribed to the will before or after making the mark and the mark is made in the presence of two competent witnesses. Remember that the law was changed to allow the

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35. The requirements for execution of a will are provided in 20 Pa.C.S. § 2502.
37. 20 Pa.C.S. § 2502. This provision was amended in 1994 to permit the execution by mark to take place before or after the name is subscribed. Before the amendment, it had to be subscribed after the mark was made.
name to be in place before the mark was made. Witnesses are not required when a testator is able to sign the document on his or her own.

13-3.2.1.4 Signature by Another

A third party may sign a will at the testator’s direction and in the testator’s presence. If this procedure is used, the will should be read aloud in the testator’s presence. It may also be advisable for the witnesses and the attorney, by separate memorandum, to document that the will was read to the testator and that the testator directed the other person to sign for him or her.

13-3.2.1.5 Order of Signing

a. Will. Even though witnesses are not required for a valid will in Pennsylvania, it is advisable to have two attesting witnesses if possible. With attesting witnesses, the testator should sign first in the presence of the witnesses, followed by the witnesses.

b. Other Documents. 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, the provisions of section 2515 of the PEF Code should be viewed before the execution of the documents. The attorney will need to plan ahead to coordinate the signatures of the trustees. However, a trust in Pennsylvania is valid without an acknowledgment from a trustee, so a settlor may sign a trust and then a pour-over will even if the trustee has not signed the trust. However, the best practice is to have the trustee sign first, if possible. Since most inter vivos trusts also have the settlor as a trustee, obtaining the trustee’s signature is generally not very difficult.

13-3.2.2 Witnesses
13-3.2.2.1 Presence of Witnesses

Pennsylvania law does not require any attesting witnesses or subscribing witnesses, but it is the usual custom to have at least two attesting witnesses since probate requires that the will is proved by the oaths of two competent witnesses.

13-3.2.2.2 Competency of Witnesses

A competent witness is an adult who, at the time of making the attestation, could testify in court to facts to which he or she attests by subscribing his or her name. Even children under age 18 may serve as a witness if they are able to understand the significance of the execution of the will.41

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. In addition, a person designated as executor under a will may still be a competent witness.43 However, it is better to use completely disinterested witnesses, if possible.

38. Id. See appendix 13A for sample language to insert if a third party is signing.
39. See 20 Pa.C.S. § 2515—devise or bequest to a trust permits the pour-over if the trust is established before, concurrently with, or after the will is executed.
40. See id. §§ 2502 and 3132.
41. See, e.g., Cawley’s Estate, 20 York 38 (1905).
43. Id. But see section 13-3.2.2.4 for consideration in selecting witnesses.
13-3.2.2.3 Number of Witnesses

Pennsylvania law does not require a witness for a will to be valid.\textsuperscript{44} However, with the mobility of clients today and the possibility that a will may be submitted for probate in another state, it may be good practice to have two disinterested witnesses,\textsuperscript{45} if they are reasonably available, even though that is not technically required under Pennsylvania law.

13-3.2.2.4 Considerations in Selecting Witnesses

Although an interested party is technically a competent witness, it is 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. Even among disinterested witnesses, there may be some differences in the weight of their later testimony on the issue of legal capacity.\textsuperscript{46}

State laws differ as to the impact of using an interested witness. For example, District of Columbia law provides that bequests and devises to attesting witnesses are void to the extent that they exceed the intestate share the witnesses would receive, although the witnesses would not be disqualified from testifying as to the execution.\textsuperscript{47}

13-3.2.3 Holographic Wills

Holographic wills are recognized in Pennsylvania. A holographic will is a will that is wholly in the testator's handwriting. As long as this form of will is signed by the testator at the end, it is a valid will.\textsuperscript{48}

13-4 PROOF OF EXECUTION OF WILLS

13-4.1 In General

If the will was properly executed, there should not be any problems when the will is offered for probate after the testator's death. The will must be proven by two competent witnesses before it will be admitted to probate. If the will is not self-proving, the register of wills will require proof by two subscribing witnesses, if available, or by nonsubscribing witnesses who can attest to the validity of the testator's signature.\textsuperscript{49}

13-4.2 Self-Proving Wills

13-4.2.1 In General

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 section 3132.1 of the PEF Code.

\textsuperscript{44} 20 Pa.C.S. § 2502.

\textsuperscript{45} Since a few states require three witnesses for the valid execution of a will, the attorney should consider whether it may be appropriate to use additional witnesses during the execution of the will. However, the "full faith and credit" clause of the U.S. Constitution should allow a will that is validly executed in one state to be admitted to probate in any other state, even where such state may require additional witnesses for the valid execution of a will.

\textsuperscript{46} See section 13-5.4.8.5 in this chapter.

\textsuperscript{47} D.C. Code Ann. § 18-104.

\textsuperscript{48} 20 Pa.C.S. § 2502.

\textsuperscript{49} Id. § 3132(1).
A will may be made self-proved by the acknowledgment of the will by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths in Pennsylvania and evidenced by a certificate attached or annexed in the form as set forth in section 3132.1. If the sworn statements of the witnesses are taken in this manner, they will be accepted by the register of wills as if they had been taken before the court.

A codicil with a self-proving affidavit under section 3132.1 will have the effect of making the will itself be a self-proved will (even if it was not originally done that way), as long as the codicil expressly confirms, ratifies, and republishes the prior will.

**13-4.2.2 Complying With Self-Proving Procedure**

Section 3132 sets out the steps for creating a self-proved will and should be followed carefully. The affidavit should state that the testator declares to the notary and the witnesses that the instrument is the testator’s last will and testament, that the testator has willingly signed or directed another to sign it for him or her, and that the testator has executed it in the presence of the witnesses as a free and voluntary act for the purposes expressed in the document. The witnesses’ statement should state that the will was executed and acknowledged by the testator in their presence as the testator’s last will and testament and that they, in the testator’s presence and at the testator’s request and in the presence of each other, subscribed their names as attesting witnesses on the date the will is signed.

If a notary is not available, the will may be made self-proving by having an attorney witness the signatures of the testator and witnesses.

**13-4.2.3 Consideration in Selecting the Notary**

The attorney should be aware of any potential for conflict of interest in the selection of the notary to handle the execution of the will and other estate planning documents. In particular, it would be preferable to use a notary public who is not a beneficiary or designated fiduciary under the will. Remember that if there is a will contest, the notary will be a witness to the execution of the document.

**13-4.2.4 Advantages to Using Self-Proving Affidavit**

If the will or codicil is properly executed with the self-proving affidavit attached, there is no need for any witnesses to appear at the time of probate. This avoids any problems that could otherwise arise if witnesses have died or cannot be located—although nonsubscribing witnesses can always be used to prove the will, if necessary.

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50. See appendix 13B for the form of this certificate.
51. 20 Pa.C.S. § 3132.1.
52. Id.
53. For a form of self-proving affidavit, see appendix 13B.
54. 20 Pa.C.S. § 3132.1(c) provides for the attorney to witness the signature. The attorney then has to have his or her signature witnessed by a notary. It may be advisable in some situations to have both the standard and the attorney self-proving affidavits prepared.
13-4.2.5 Using a Self-Proving Affidavit May Discourage Executor from Seeking Legal Counsel Prior to Probate

Some commentators believe that the increase in the use of self-proving affidavits may result in more wills being admitted to probate without prior consultation with counsel. The concern is that important issues may be overlooked by people unfamiliar with legal matters, such as:

- whether probate is even necessary given the nature of the assets involved;
- the advisability of the use of qualified disclaimers under IRC § 2518;
- the valuation of property for estate or inheritance tax purposes or for future income tax basis issues; and
- the need for filing federal and state death tax returns or fiduciary income tax returns.

However, it appears that the benefits of self-proved wills outweigh the disadvantages. Also, the literature given to a newly qualified executor by some county probate clerks often stresses the need for consulting with an attorney about issues such as those listed above. Since the use of legal counsel by an executor is somewhat independent of whether a will employs a self-proving affidavit, the better practice is to use the affidavit in order to simplify the probate process.

13-4.2.6 Ethical Considerations

Although there is no legal requirement that an attorney incorporate the self-proving clause in a will, an attorney should be able to advise the client not only of the existence of this option but also of the impact of the use or nonuse of the clause in the future. Furthermore, a general policy of omitting the self-proving clause from wills for the sole purpose of forcing the client’s heirs to return to the attorney for assistance with estate administration may violate Pa.R.P.C. 8.4.55 However, the omission of the self-proving affidavit is entirely appropriate where it is omitted due to the fact that a notary is not available to participate in the execution of the will.56

13-4.3 Wills Probated Outside Pennsylvania

If a duly authenticated copy of a will proved in a state other than Pennsylvania and an authenticated copy of the record of the probate proceeding for the original will are presented to the register of wills, the will is entitled to probate in Pennsylvania. If the will was probated outside of the United States, supplemental evidence may be required if the probate record from the foreign jurisdiction shows that an essential requirement of Pennsylvania law for a valid will has not been met.57

13-5 DOCUMENT EXECUTION CEREMONY

13-5.1 In General

The attorney should establish and follow a standard operating procedure for the execution of wills and other estate planning documents in his or her office. It may be possible to prove compliance with execution requirements by proof of the standard operating procedure if no one is able to recall the facts of a particular execution ceremony.58

56. In a situation where a notary is not available during the execution of the will, an attorney affidavit may be used to make the will self-proving. However, the attorney affidavit must be signed later by the attorney witness in the presence of a notary to make the will self-proving. If a notary is truly unavailable, even the use of an attorney affidavit may not be practical.
57. See 20 Pa.C.S. § 3136.
13-5.2 Place of Execution

13-5.2.1 Attorney’s Office

The attorney’s office is generally the best place for executing the documents. The standard office procedures can be followed, and the office provides a more solemn setting than the client’s home or other location. As discussed above, the testator as well as the witnesses\(^{59}\) and the notary for a self-proved will\(^{60}\) should be in the room at the same time, preferably with the door closed.

13-5.2.2 Other Location

If it is necessary to sign the documents elsewhere, such as at the client’s home or a hospital, the attorney should take extra care in following the formalities. If possible, persons not required to be present should leave the room while the execution formalities are handled.

13-5.3 Redetermination of Legal Capacity

Before starting the execution of the documents, the attorney must be satisfied that the testator has the required legal capacity at that time.\(^{61}\) Where a testator has marginal legal capacity, additional precautions should be taken during the execution ceremony, as set forth in section 13-5.4.8, below.

13-5.4 Execution Procedure

13-5.4.1 Securing Document Pages

The attorney should be sure that the pages of the documents are secured to each other before execution. Only the original of the will should be signed.\(^{62}\)

13-5.4.2 Interviewing the Testator

It is good practice to pose questions to the testator in the presence of the witnesses to demonstrate to the witnesses that the testator has the necessary capacity and intent. This is particularly true if the witnesses have not seen or spoken with the testator before the execution ceremony.\(^{63}\)

13-5.4.3 Initialing or Signing Each Page

Many attorneys like to have the testator sign or initial each page of the will as additional protection against future alterations and also for identification purposes, although there is no legal requirement that this be done. In fact, multiple signatures on the will may confuse the requirement that the will shall be signed at the end and may open up the document for challenge based upon the location of the multiple signatures. Some attorneys have the wills signed on the side of each page but the last to avoid any confusion.

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59. See section 13-3.2.2 in this chapter.
60. See section 13-4.2.2 in this chapter.
61. See section 13-3.1 in this chapter for a discussion of legal capacity.
62. See section 13-7.3 in this chapter regarding copies to be made after the original is signed.
63. See also section 13-5.4.8 for additional safeguards for a testator with marginal capacity.
13-5.4.4 Last-Minute Changes

If possible, last-minute document changes should be avoided. If the client desires a last-minute change and it is possible to make that change on the word processor while the client waits, the attorney should be very careful that no other changes are inadvertently made in the document, such as dropping a line from the affected pages. If necessary, interlineations are permitted as long as they are done before execution of the document.64 The testator should acknowledge the interlineation in the presence of the witnesses, and both the testator and the witnesses should initial the interlineation. It is good practice to have the testator and the witnesses also sign a memorandum acknowledging that such an interlineation was made before execution and also to add a reference to the interlineation in the attestation clause. An interlineation made after the execution of a will is not deemed to be part of the will and will have no force and effect unless it is sufficient to cancel or partially revoke the will.65 Although it is possible that such an interlineation may be a holographic codicil under Pennsylvania law, it would be better to make the interlineation prior to the execution of the will to avoid any potential contest of the handwritten provision. Finally, erasures before the execution of a will should be avoided if at all possible.

Remember that the law is different for the requirements for deletions and interlineations. The deletion is effective if the testator/testatrix makes it. The interlineation needs to be signed or initialed and, preferably, dated.66

13-5.4.5 Blind Testators

There is no reason that blind testators cannot sign wills themselves, using templates or other mechanical aids if necessary. It is good practice to read the document to the testator in the presence of the witnesses, which will also provide evidence of testamentary capacity. Additional safeguards include having the witnesses and attorneys sign a memorandum documenting the execution procedure and modifying the attestation clause to include the fact that the will was read to the testator before signature.

13-5.4.6 Testators With Other Physical Disabilities

The attorney should make sure that the place of document execution will be comfortable and accessible for clients with physical impairments. The attorney should have a choice of pens available, since many older clients find it difficult to write with ballpoint pens and seem to do better with a rolling ball pen. For some clients it is easier to have a larger signature space than normal, with some additional white space around the area of the signature line, since they may have difficulty restricting their signature to a small area. These special needs can be ascertained by the attorney before the execution ceremony.

13-5.4.7 Presence of Other Persons

As a matter of general operating procedures, the attorney may want to limit those parties present to the witnesses and notary. Unless there is some specific reason to have the family members or beneficiaries present, it is better to have them wait outside the room in order to reduce distractions from the solemnity of signing as well as to reduce the likelihood of a later claim of undue influence. A practice of excluding family members and beneficiaries permits the attorney to testify that exclusion is his or her standard practice.

64. See Okowicz Will, 169 A.2d 84 (Pa. 1961); Hickman’s Estate, 162 A. 168 (Pa. 1932).
65. Id.
13-5.4.8 Special Safeguards for Marginal Testators

13-5.4.8.1 Conversation With Testator

If there is a question of testamentary capacity, the attorney should exercise heightened caution at the time of execution when speaking with the testator in the presence of the witnesses about the testator’s family, general affairs, provisions of the will, and the testator’s business affairs. This should be done in a conversational manner, rather than with leading questions that would only elicit short “yes” or “no” answers from the client. If substantial changes have been made from prior wills, they should be discussed at this time, too.

13-5.4.8.2 Execution Memorandum

In a case where a challenge may arise later about testamentary capacity, it is good practice to have an execution memorandum signed by all persons, to be kept in the attorney’s file. This memorandum would simply discuss the general procedure that was followed and summarize the conversation that was held between the testator and the attorney and other persons in the room. Also, it is generally advisable for those present to complete some type of simple summary of the person’s appearance and general demeanor if it is likely the testator’s capacity may be challenged.

13-5.4.8.3 Videotaping of Ceremony

While videotaping the will execution ceremony is becoming more common, this is not a substitute, by itself, for satisfying the technical requirements of execution outlined above. It may, in a contested case, help with proof of testamentary capacity or intent, although rules of evidence would need to be considered. On the videotape, the attorney can discuss the terms of the will and discuss the client’s wishes. The attorney must be careful that the presence of the camera and its operator does not diminish the privacy and formality of the will-signing ceremony. Keep in mind that some people are intimidated by the camera and may not act naturally while on film. Counsel contesting a videotaped will execution should ask for copies of all takes of the videotaping.

13-5.4.8.4 Obtaining a Doctor’s Opinion

Subject to the various ethical issues facing the attorney in dealing with a marginal testator, the attorney may want to talk with the client’s attending physician close to the time of execution of the documents to verify the doctor’s view of the client’s capacity. The evidence of the doctor attending the testator at the time the document is signed may be entitled to great weight in a subsequent court challenge to testamentary capacity. However, an attorney’s assessment of an individual’s testamentary capacity may carry even greater weight due to the attorney’s prior experience in applying the legal standard of testamentary capacity. The critical time is the execution of the will, so the assessment of the attorney who was then present should be accorded great weight.

67. For an alternative checklist for participants in a self-proving will ceremony, see appendix 13C.
68. See section 13-3.1.3.7 in this chapter.
13-5.4.8.5 Selection of Witnesses

Even though the attorney may have a number of individuals available who would technically be legally competent witnesses, \(^{71}\) the attorney should use extra care in selecting the witnesses in the case of a marginal testator.

A witness who knows the testator well personally, yet has no financial interest, would be a good choice, since a court may give great weight to the testimony of such a witness. Using staff members in the attorney’s office who have no prior acquaintance with the testator might not be that helpful in a subsequent court action involving testamentary capacity, unless the attorney took additional steps at the execution ceremony, such as conducting a detailed conversation in the presence of the staff witnesses. \(^{72}\) The attorney should also consider who might be available to testify if the will is contested.

The testimony of an attorney who has discussed the will with the client, drafted it, explained it to the testator, and is present at its execution may be entitled to great weight for determining the mental capacity of the testator.

13-6 EXECUTION OF OTHER ESTATE PLANNING DOCUMENTS

13-6.1 Trusts

Until recently, there were no express requirements for the creation of a trust in Pennsylvania. However, with the passage in 2006 of the Pennsylvania Uniform Trust Act, 20 Pa.C.S. § 7701 et seq., the Commonwealth now requires that the settlor of a trust follow formalities similar to those when executing wills.

13-6.1.1 Creation of Trust

A trust is created by a transfer of property under a written instrument to another person as trustee during the settlor’s lifetime or by will or other written disposition taking effect upon the settlor’s death; by a written declaration, signed by or on behalf and at the direction of the owner of property, that the owner holds identifiable property as trustee; or by a written exercise of a power of appointment in favor of a trustee. \(^{73}\) A trust may be created only to the extent that its purposes are lawful and not contrary to public policy. \(^{74}\) A trust or an amendment to a trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence. \(^{75}\) Oral trusts created in Pennsylvania are unenforceable. \(^{76}\)

13-6.1.2 Requirements for Creation

Section 7732 of the PEF Code provides:

(a) REQUIREMENTS.—A trust is created only if:

(1) the settlor has capacity \(^{77}\) to create a trust;

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71. See section 13-3.2.2.4 in this chapter.
72. See sections 13-5.4.8.1 and 13-5.4.8.2.
73. See 20 Pa.C.S. § 7731.
74. See id. § 7734.
75. See id. § 7736.
76. See id. § 7737. See also section 7733, which applies to written trusts not created by will in other jurisdictions.
77. See footnote 21; for capacity to execute revocable trust specifically, see 20 Pa.C.S. § 7751.
(2) the settlor signs a writing that indicates an intention to create the trust and contains provisions of the trust;

(3) the trust has a definite beneficiary or is:
   (i) a charitable trust;
   (ii) a trust for the care of an animal, as provided in section 7738 (relating to trust for care of animal—UTC 408); or
   (iii) a trust for a noncharitable purpose, as provided in section 7739 (relating to noncharitable trust without ascertainable beneficiary—UTC 409);

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and sole beneficiary of the trust.

(b) (Reserved).

(b.1) SIGNATURE BY MARK OR ANOTHER.—A trust instrument other than a will may be signed by mark or by a person other than the settlor on behalf of and at the direction of the settlor in the same manner as a power of attorney under Chapter 56 (relating to powers of attorney).78

(c) POWER TO SELECT BENEFICIARY FROM INDEFINITE CLASS.—A power in a trustee to select a beneficiary from an indefinite class is valid. If the power with respect to a noncharitable trust is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

(d) DEFINITION.—As used in this section, the term “definite beneficiary” means a beneficiary that can be ascertained now or in the future, subject to any applicable rule against perpetuities.

13-6.1.3 Other Considerations

If an exhibit is attached identifying the initial assets of the trust, it is advisable to have the grantor place the date on the schedule or make a similar mark to indicate the grantor has acknowledged 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 the sending of Crummey notification letters to the beneficiaries, the securing of a tax identification number, the mechanics of establishing a bank account for the trust, and the completion of any changes of beneficiary forms for assets that may later be payable to the trust.

13-6.2 Powers of Attorney

Act 95 of 2014 made substantial changes to the provisions of chapter 56 of the PEF Code, which governs powers of attorney in Pennsylvania. This means that powers of attorney executed on or after January 1, 2015, need to comply with the new provisions, which include a new and modified notice provision (see appendix 9A to chapter 9 in this book for a sample form). Signatures of

78. See section 13-6.1.3, below.
the principal are required to be notarized. The notary cannot be the agent designated in the power of attorney. The agent’s duties are now specified in detail in 20 Pa.C.S. § 5601.3. The rules for gifting have been tightened up and are set forth in or governed by 20 Pa.C.S. §§ 5601.3 and 5603(a.1). Agent’s gifting is covered by subsections 5603(a.1), (2), and (3).

The agent is required to comply with the provisions of 20 Pa.C.S. § 5601.4, which set forth those areas that now require specific authority, such as gifting, changing rents and survivorship, and changing beneficiary designations. Forms of the new powers of attorney provided in the appendices to chapter 9 in this book.79

13-6.3 Advance Directives for Health Care

The client must sign the original of an advance medical directive in the presence of two unrelated witnesses. While the law does not require a 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.80

13-6.4 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 document execution ceremony may be an appropriate time for the client to complete the paperwork to make an anatomical gift. The gift must be in writing and must be signed in the presence of two witnesses.81 An alternative method for making an anatomical gift in Pennsylvania is to make the appropriate designation when applying for a driver’s license.

13-7 SAFEKEEPING OF THE DOCUMENTS

13-7.1 In General

There are several alternatives for the safekeeping of executed documents. Regardless of which place is selected by the client, it is important to make a notation in the client’s file and by written confirmation to the client as to where the documents will be kept. The considerations vary depending on the types of documents involved, such as wills, trusts, tangibles memoranda, powers of attorney, and advance directives for health care.

13-7.2 Originals of Documents

13-7.2.1 Testator’s Safe-Deposit Box

13-7.2.1.1 In General

If a client has a bank safe-deposit box, this may be an appropriate place to keep the client’s executed will. This will keep the documents safe from fire, other casualty, theft, or tampering.

79. Prior powers of attorney are not invalidated by the provisions of Act 95 of 2014. However, as a practical matter, updating a client’s power of attorney should be considered as part of the ongoing estate planning process.

80. See 20 Pa.C.S. § 5404(a).

81. See id. § 8613.
13-7.2.1.2  **Legal Considerations**

Although the laws of other states may make access difficult, Pennsylvania law makes it fairly easy to get to the will when it is kept in a bank safe-deposit box. Pennsylvania law provides that any interested person may have access to a safe-deposit box for the limited purpose of removing the will.82

13-7.2.1.3  **Practical Considerations**

If the safe-deposit box is in joint names with a spouse, the spouse may access the box after the testator’s death without relying on this statute.

The Pennsylvania statute applies to a will, a cemetery deed, or other testamentary papers. Therefore, it is necessary for the attorney to discuss with the client the appropriate place to keep the various documents he or she has executed, including those that may be needed during the client’s lifetime, such as the durable power of attorney and advance directive for health care. The commercial safe-deposit box may not be the appropriate place for the originals of these documents if the agents named are not joint tenants of the safe-deposit box.

13-7.2.2  **Testator’s Home**

Many clients choose to keep all of their documents at home in a fireproof box, file cabinet, or similar location. It is important to discuss with the client the importance of keeping these documents safe from fire, flood, theft, and possible tampering by others. Keep in mind that the presumption arises that a will last seen in the possession of a testator that cannot be found was destroyed or revoked by the testator.83

13-7.2.3  **Attorney’s Possession**

13-7.2.3.1  **Safe-Deposit Box**

Some attorneys have large safe-deposit boxes in a bank convenient to their law offices. 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.84

The attorney should keep a record of the contents of the safe-deposit box. Generally, the record should be maintained by the office manager and a spare copy kept in another location. If the records are maintained on computer, a hard copy of the safe-deposit box contents, updated from time to time, should also be kept with the law firm records. A card system can be used to list the basic information on each client whose documents are stored, with a place to note removal and return of the documents.85

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82. See 72 Pa.C.S. § 9192(e).
84. See section 13-7.2.3.2 for the standard of care imposed upon the attorney in this situation.
85. See appendix 13D.
13-7.2.3.2  *Fiduciary Duty and Professional Liability*

If the attorney agrees to keep clients’ original documents, he or she will be held to the standard of care imposed upon a professional fiduciary and is exposing himself or herself to several aspects of potential professional liability.

13-7.2.4  *Corporate or Professional Fiduciary*

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

13-7.2.5  *Non-attorney Fiduciary*

It may or may not be appropriate for a non-attorney fiduciary (such as a family member or friend) named in the documents to hold the originals. It could prove more difficult or sensitive for a client who later wants to change the documents and wants to retrieve the originals. Also, the non-attorney fiduciary may be exposing himself or herself to some type of claim of undue influence should a challenge later arise to the testamentary capacity of the client when the documents were signed.

13-7.2.6  *Lodging Will with Register of Wills*

The person with possession of an original will, including the testator, may lodge (i.e., deposit) the will with the register of wills for safekeeping pending any further proceedings related to the will (i.e., probate, caveat, will contest, etc.). The party lodging the will should obtain a receipt from the register upon surrendering the original document. A will may also be lodged with the register prior to a client’s death. For example, lodging the will with the register when a client has become incapacitated may avoid a claim by a disgruntled heir that the will was somehow altered after the client’s incapacity.

13-7.3  *Copies of Documents*

13-7.3.1  *Wills*

Since all original wills executed at the same time must be presented for probate, the testator should sign only one original of the will. The attorney should provide the testator with photocopies of the will clearly marked “copy,” preferably stamped at the top of the documents as well as through the signature lines toward the end of the documents. Some attorneys prefer to use conformed copies rather than actual photocopies of the signed documents. Conformed copies are those on which a staff person in the attorney’s office types the names and dates as they were signed, preceded by “/s/.”

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86. See, e.g., Pa.R.P.C. 1.15 (attorney’s duties in safekeeping of client’s property). See also Pa.R.P.C. 1.16(d) (attorney’s duty to return original wills and other documents to client upon request, whether or not legal fees and costs have been paid).

87. See section 14-3 of chapter 14 of this book, dealing with the importance of terminating the relationship with a client, for a full discussion of the issues involved.
13-7.3.2 Trust Agreements

The attorney must determine whether it makes sense for the settlor to sign multiple copies. The decision may depend upon the number of trustees and whether the trust will be funded during the settlor’s lifetime, since financial institutions holding property in trust may require an original copy of the trust agreement. In any event, the attorney should provide the settlor with photocopies of the trust agreement clearly marked “copy.”

If the attorney is going to retain the original documents, he or she may wish to mark the non-originals with a rubber stamp that indicates that the non-originals are copies and that the originals of the documents are located with the law firm.

13-7.3.3 Powers of Attorney

It is good practice to have multiple copies of powers of attorney executed. This is because banks and other financial institutions often require the originals of powers of attorney to be presented to them. The agent is permitted to use the power of attorney until he or she has been advised it has been revoked. Revocation can be incorporated into a new power or effected by a separate document. Given the accounting safeguards and other protections now part of chapter 56 of the PEF Code, the principal has some protection. If improper use of the power of attorney is a concern, then the attorney can retain the originals until needed. If only one original is executed, then it is often possible to accompany a copy of the power of attorney with an affidavit of the agent that the copy is a true copy, that the power of attorney has not been revoked, etc., while the agent still retains custody of the original document. See appendix 9A, chapter 9 in this book, for the proper form of power of attorney as of January 1, 2015.

13-7.3.4 Advance Directives for Health Care

Similar to powers of attorney, the attorney should discuss with the client whether the client should execute multiple originals of the advance directive for health care. Often, it is a good idea to execute multiple originals so that the client may provide one to his or her doctor for inclusion in the client’s permanent medical records. For a client who has been diagnosed with a terminal illness, the advance directive should be on file with the institution that will be providing end-of-life care. Copies of the original should be made and stamped “copy.”

13-7.3.5 Use of Document Covers on Document Originals

It may be advisable to place some type of cover paper (blueback, document envelope, etc.) on the original of each signed document. This will make it easier for the client and the client’s family to identify and safeguard the originals, which are sometimes hard to distinguish from quality photocopies.

13-7.4 Documentation of Location of Originals and Copies

As discussed above, copies should be clearly marked as such. The attorney should use either a receipt system for sending the originals to the client or corporate fiduciary or be sure that the closing letters to the client or corporate fiduciary contain clear documentation of the location of the originals and copies.

88. See 20 Pa. C.S. § 5606.

89. See section 14-3 of chapter 14 regarding the importance of written communication to document the termination of representation. See appendices 14A and 14B of chapter 14 for sample letters.
13-7.5 Disposition of Prior Documents

Historically, some attorneys believed that the destruction of prior documents was appropriate. Since the decision in *Estate of Briskman*, that is no longer the case.\(^{90}\) The prior documents that are presumptively valid establish who has standing to contest the last-in-time documents. In a will contest, the probated will can only be challenged by those who have appropriate standing. Before *Briskman* and its progeny, this meant intestate heirs and those taking under prior documents. *Briskman* makes it clear that if a prior will exists that was valid until revoked by the probated document, only those taking under that prior will have standing. Thus, retention of prior wills can be used to raise the issue of standing to challenge the probated will. The prior wills may also provide insight into the evolving testamentary scheme of the decedent.