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## Drafting of the "Simple" Will

Ellis V. Rippner\*

THE SO-CALLED "SIMPLE" WILL is by far the most common type of will drafted by the attorney. In jest it has been said to be that legal instrument requested by the newly retired business man who wishes to "place his house in order" prior to an extended vacation. Double-parked in front of his attorney's office, he wants the will drafted "instantly" so that he can start his trip with "peace of mind." In fact, seldom does a client suggest that his estate problem requires anything *more* than a "simple will." In truth, however, no properly drafted will can properly be designated as "simple."

No two persons, at the time of drafting of their wills, have identical problems. The "cloth" may be the same for each, but the cut and style must of necessity vary. Precedents can be of aid in the choice of phraseology, but the individual requirements of each estate will dictate the specific form of will. This is the reason why, in the construction of a will, prior decisions are of little value. In most cases, courts are unwilling to construe a will in a certain manner merely because in a previous case they have construed a will containing similar expressions in that manner. To do so may be to totally disregard the testator's real intention. For example, a slight difference in language used by the testator may indicate a great difference in his intention.<sup>1</sup> It follows, therefore, that although precedents may aid in construction, they are not the same controlling forces in respect to wills as in other branches of the law.

The "simple" or "boilerplate" will often has been described as "CC of CC"—"Commonly the Creator of Costly Complications."<sup>2</sup>

The draftsman's chief objective should be to see that, as far as the law permits, the testator's desires shall be carried out. If this is to be done and the estate saved the disastrous cost of construction proceedings, the will must be made entirely clear.

Wills that are not long enough may be too simple and become second only to "home-made" testaments as breeders of litigation. A will must be adequate in length, artistry and explicitness in order to say clearly what it means. If a will is even one word shorter than this, it is "not long enough"!

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<sup>1</sup> 2 Page on Wills, Sec. 914 (Lifetime ed. 1941); 41 Ohio Jur., Wills Sec. 457 (1935).

<sup>2</sup> Am. Bar Association, Property Probate & Trust 99 (1953).

When a client requests that a will be drafted wherein his legatees and devisees inherit substantially in the same fashion as they would under the statute of descent and distribution,<sup>3</sup> the scrivener's problems and precautions are minimized. Anything descendable is devisable.<sup>4</sup> Thus, any property, right or interest that would pass by operation of law may be disposed of by the testator. However, if the testator wishes to prefer persons in an order other than that provided by the statute of descent and distribution,<sup>5</sup> the "red light" of a possible will contest shines brightly. Every precaution then should be taken in the drafting of the will, in order to insure that the last wishes of the testator are fulfilled.

First in the list of precautions is the principle that the "introductory clause" of the will should identify the testator by the name which he most commonly uses to identify himself. The name he uses on commercial accounts and savings passbooks is generally conclusive for this purpose. However, if he has assets held in any other variations of his name (e.g., using a full middle name, or mere initials, or any aliases), these variations should be fully disclosed in the introductory clause by the use of such phrases as: "also known as," or "otherwise known as."

Stock transfer agents and the Treasury Department<sup>6</sup> require certified copies of letters testamentary whenever assets are sold, distributed in kind, redeemed or reissued. Unless the decedents' names appear identical on the letters of appointment (testamentary) to that which appears upon a particular asset, amended letters containing the identical name must be secured.

This precaution is of particular importance where the title name in real estate varies from that on letters testamentary, since title companies generally require not only an amended certificate but also republication of appointment under the title name.

Next, the testator should specifically set forth the name of the city or town which he considers his permanent residence, in order to assist the court in determining the question of domicile should it be put in issue. Although the recital as to the testator's domicile as suggested in his will is not conclusive,<sup>7</sup> his written declarations generally outweigh his oral declarations.<sup>8</sup> In the absence of any other evidence to the contrary, a recital by the testator as to residence will be controlling.<sup>9</sup>

The introductory clause of the will also should contain a statement of testamentary capacity. In Ohio the requirements

<sup>3</sup> Ohio Rev. Code, Sec. 2105.06.

<sup>4</sup> *Wagner et al. v. Schrembs*, 44 Ohio App. 44, 184 N. E. 292 (1932).

<sup>5</sup> Ohio Rev. Code, Sec. 2105.06.

<sup>6</sup> U. S. Treas. Dept. Circular 530, Sec. 315.7-(b).

<sup>7</sup> *Renwick v. Macomber*, 233 Mass. 530, 124 N. E. 670 (1919); See *In re Benson's Wills*, 92 N. J. Eq. 618, appd. 93 N. J. Eq. 671 (1922).

<sup>8</sup> *In re Eaton's Will*, 186 Wis. 124, 202 N. W. 309 (1925).

<sup>9</sup> *In re Costello's Will*, 114 N. Y. S. 2d 525 (1952).

for such capacity are that the testator be of "full age, sound mind and memory and not under restraint."<sup>10</sup> Although the statement is self-serving, it still is a declaration of the testator, tending to show his thoughts regarding his mental capacity at the time of the execution of the will, and as a general rule this statement is admissible into evidence.<sup>11</sup> If the testator is physically ill, or is making what is commonly known as a "death bed" will, I would specifically suggest that in the introductory paragraph the place where the will is being made (such as a hospital, convalescent home or the like) and the conditions under which it is being made, be set forth. This is in order to dispel the argument so often made in an action to contest that had the testator been apprised of the gravity of his condition, his will would have been drawn otherwise.

The introductory clause should also specifically provide for a revocation of all former wills or codicils in accordance with the statute, Ohio R. C. 2107.33; otherwise the will at hand only revokes the former will so far as the provisions of the later will are inconsistent with the provisions of the former will.<sup>12</sup>

The cardinal and unforgivable sin of the draftsman is ambiguity. The attorney should set forth precisely what consequences the testator wishes to secure and not leave these to implication. In the will of William B. Fuller, Chief Justice of the United States Supreme Court, he devised "to his children or their children, equal shares," thus creating a doubt whether they inherited per stirpes or per capita.

It is universally the law that "it is not what the testator is presumed to have meant, but what he says."<sup>13</sup> When a will is construed, the questions always in the mind of the court are not what the testator should have done, but what did he do and what did he mean by the words which he actually employed.<sup>14</sup>

A simple precaution in this regard is to use the same phrases or words throughout the will when you mean the same thing. If you commence the will by identifying legatees and devisees by their given names, continue to do so. Do not risk changing their identity by saying "nieces and nephews" or similar phrases, in a later portion of the instrument.

Use simple terms—language that your client, as a layman—can comprehend. Omit unnecessary language. By all means avoid the archaic phraseology. Use modern expressions that cannot be misinterpreted.

Brevity and the economy of words are the mark of a good draftsman. However, even here, in at least one instance, a pre-

<sup>10</sup> Ohio Rev. Code, Sec. 2107.02.

<sup>11</sup> Page, *op. cit.*, *supra*, n. 1, Sec. 797.

<sup>12</sup> I Page on Wills, Sec. 464 (Lifetime ed. 1941); see also *Paully v. Crooks*, 41 Ohio App. 1, 179 N. E. 364 (1931); *Hennessy v. Volz*, 59 Ohio App. 1, 16 N. E. 1019 (1938).

<sup>13</sup> *Smith v. Hunter*, 86 Ohio St. 106 (1912).

<sup>14</sup> Page, *op. cit.*, *supra*, n. 1, Sec. 919; 41 Ohio Jur., Wills Sec. 468 (1935).

caution must be observed. To illustrate—where the residuary estate is left by parents to children, I recommend the clause: "I give to my children equally. Should any of my children predecease me, leaving child or children surviving, said child or children shall take the share of the deceased parent as if the deceased parent would have survived me." Brevity and economy in words would best be served by stating "to my children per capita or their lineal descendants per stirpes." The meaning of the legal phraseology being so well defined that no interpretation would be necessary.<sup>15</sup> This brief phraseology would have meant exactly the same without any interpretation to the bench and the bar, but not to my client and his family. They generally would require more of my time in explanation of the terms "per capita" and "per stirpes" than the amount of time expended in my being verbose in the drafting of the document.

Often, funeral arrangements are of concern to the testator. In such situations, the scrivener should, if requested by his client, specifically provide for the type and cost of his burial, the funeral director, and the church of his choice. The testator may further desire to provide specifically for the erection of, and type of, tombstone. In absence of statutes to the contrary, such provisions in the will are binding.<sup>16</sup> In Ohio, payment for tombstones or monuments, or for perpetual care, is expressly permitted by statute.<sup>17</sup>

There is always a danger that because of lack of information in a will burial instructions may be disregarded. Therefore, such instructions should also be given orally or by letter by the testator to the members of his family as well as to the suggested executor to avoid any problems.

A common request of a testator is for the disposition of his body after death by way of cremation or for medical research, etc. The validity of a provision in a will making proper disposition of a testator's body has been upheld as not being against public policy and it has been stated that great consideration must be given to such wishes of the decedent.<sup>18</sup>

On this point, there is an early case in Ohio which follows the minority rule holding that there is no property right in a dead body and hence it cannot be disposed of by will. I doubt whether we need fear this individual issue should the situation arise, as long as the disposition by will of the body is in a manner which is not shocking. It appears that consideration of the property question causes unnecessary confusion, and that the solution lies in taking a more realistic view of the purpose of probate, and in treating the expressed wish of the testator as an act of

<sup>15</sup> 3 Page on Wills, Sec. 1073, 1074 (Lifetime ed. 1941).

<sup>16</sup> Thompson on Wills, Par. 9 (3rd ed. 1947).

<sup>17</sup> Ohio Rev. Code, Sec. 2113.37.

<sup>18</sup> Page, *op. cit.*, supra, n. 12, Section 213. See 98 Sol. J. 19; 30 Temp. L. Q. 40.

testamentation not involving property at all.<sup>19</sup> In cases of religious differences, the desires of a testator as to his burial have been sustained.<sup>20</sup> If the testator is strong minded about the disposal of his body because of religion, a clause in form of an *in terrorem* provision can be included providing that if the testator's desires are thwarted by a legatee or devisee, any gift in the will to such person shall fail. I know of no case "on all fours" with this proposition but it would appear to be a valid "condition precedent" to the right of inheritance, unless the arrangements requested are held invalid for other reasons. In such cases, for complete protection, a letter of instructions should be sent to the proper parties at the time of the drafting of the will, and a copy of the letter attached to the will; otherwise lack of knowledge of testator's wishes might be a defense for non-compliance.

It is common practice for a testator to request that memorial prayers be said for the "repose of his soul" and the souls of deceased members of his family. In such situations the number, the type of prayers, the amounts to be expended therefor, and the length of time the prayers shall continue must be spelled out by the scrivener. It has been settled by a practically unanimous agreement of authorities that a bequest for the saying of masses is not invalid.<sup>21</sup> Trusts for the purposes of saying of masses have been sustained in Ohio.<sup>22</sup> Recently in Ohio, by statutory amendment, gifts to establish religious organizations have been relieved from the lien of Ohio inheritance taxes.<sup>23</sup>

A direction in the will for the payment of "just debts, funeral expenses and costs of last sickness" is unnecessary and should be eliminated, for generally statutes specifically provide for the priority of payment of debts and that priority cannot be varied by the language of the will.<sup>24</sup> Further, a general direction to pay debts may raise a question as to the fund to be charged,<sup>25</sup> and may further create an ambiguity as to whether the testator was directing the executor to pay debts outlawed by a statute of limitation because the clause may be construed as a direction to the representative to waive the defense.<sup>26</sup> A "just" debt might well be an unenforceable debt. Although it appears to be the general rule that such a provision in the will is meaningless where there is a statute making the payment of the testator's just debts mandatory, and the provision applied only to enforceable obliga-

<sup>19</sup> See *Recent Cases: Wills—Right of Testator to Direct Disposal of Body After Death*, 87 U. Pa. L. R. 360 (1938).

<sup>20</sup> *Guerin Cassidy*, 38 N. J. Super. 454, 119 A. 2d 780 (1955); *In re Riegler Estate*, 32 N. Y. S. 168 (1895).

<sup>21</sup> 10 Am. Jur., *Carriers* Sec. 59.

<sup>22</sup> *Lanza v. DeFranzo*, 41 Ohio Op. 390, 92 N. E. 2d 299 (1949).

<sup>23</sup> Ohio Rev. Code, Sec. 5731.09 (effec. Aug. 20, 1957).

<sup>24</sup> *Ibid.*, Sec. 2117.25; also see 4 Page on Wills, Sec. 1475 (Lifetime ed. 1941).

<sup>25</sup> *Id.*, at Sec. 1477.

<sup>26</sup> *Ritchie III*, *Drafting Simple Will for Moderate Estate*, Am. Bar Association, *Probate & Trust Law Division* 4 (1952).

tions,<sup>27</sup> which has been followed in Ohio,<sup>28</sup> such provisions raise questions of doubt, serve no useful purpose, and should be abandoned. On the other hand, if the testator wishes to relieve a gift from the payment of Ohio inheritance taxes, or to relieve the residuary estate from the payment of federal estate taxes or to provide out of the estate for the payment of federal estate taxes on taxable non-probate assets, such provisions should be spelled out with certainty and not left to the court's interpretation.<sup>29</sup>

In those wills where the testator wishes to leave his entire estate to his spouse, the usual plan of the young married couple, generally the main asset is the mansion house. In such circumstances the failure of the scrivener to follow the statute R. C. 2107.34, which provides for the disinheritance of "afterborn or pretermitted heirs," is a grave omission. Failure to specifically disinherit or make other provision therefor, gives the afterborn, adopted, etc., heir such right as he would have had, had the testator died intestate.<sup>30</sup> Whether to write such a provision in the will might be a subject of delicate discussion with your client. If your client is a young couple, inclusion "goes without saying." If the couple is elderly, the provision can be excluded. It is the borderline case which causes the complications. When in doubt, use the provision, on the theory that where "there's life there's hope." The omission of the "disinheritance" provision might not be discovered if the estate of the deceased spouse consists only of personal property. However, title companies daily are refusing to issue title guarantees because the real estate left by the deceased spouse is clouded as a result of the failure to specifically "disinherit." The omission cannot be corrected during the minority of the minor except by guardian's land sale. Further complications have arisen where the children who were not specifically "disinherited," now adults, wish to quit-claim to their parent but find that their respective spouses will not sign away their dower interests. The disinheritance provision is difficult to explain to clients, especially if it disinherits only the afterborn or adopted children. It is for that reason that I suggest you disinherit both those in being as well as afterborn. It is so seldom that a client is considering designating an heir after the execution of the will or has "a child as designated heir who is absent and reported to be dead . . ." (Ohio R. C. 2107.34) that I make no reference herein to them; although in a proper case, reference to them should be included.

<sup>27</sup> 97 C. J. S., Wills Sec. 1312.

<sup>28</sup> *Devers v. Schrieber*, 50 Ohio App. 442, 198 N. E. 601 (1935); *Estate of Carrington*, 73 Ohio L. Abs. 381 (1956).

<sup>29</sup> *Tax Commission of Ohio v. Lamprecht*, 107 Ohio St. 535, 140 N. E. 333 (1923); *In re Estate of Gatch*, 153 Ohio St. 401, 92 N. E. 2d 404 (1950); *McDougall v. Central National Bank of Cleveland*, 157 Ohio St. 45, 104 N. E. 2d 441 (1952); *In re Bingham's Estate*, 60 Ohio L. Abs. 202, 100 N. E. 2d 870 (1950).

<sup>30</sup> 57 Am. Jr., Wills Sec. 573; *Evans v. Anderson*, 15 Ohio St. 324, 2 Ohio Dec. Reprint 502 (1864); *Ash v. Ash*, 9 Ohio St. 383 (1859).

Frequently the intentions of a testator have been thwarted by the failure of the scrivener to provide for alternate legatees or devisees where the prime object of the testator's bounty predeceased the testator or died within thirty days after testator's death.<sup>31</sup> This omission was dramatically disclosed recently where a husband and wife had made mutual wills but made no provisions over if one predeceased the other. As a result of a plane crash, both were killed. In the instant case, the husband some forty years before had married the woman who had three children then all under seven years of age. For some reason he had never adopted these children, although they had taken his name and there was a mutual love and deep family affection. As a result of the failure to provide for a second beneficiary, his estate, which was over \$400,000.00, went under the law of intestate succession<sup>32</sup> to first cousins once and twice removed and of whose existence he was not even aware, while her smaller estate of about \$60,000.00 went to her children.

Although the statute prevents a lapse where the gift is made to a relative leaving issue,<sup>33</sup> the fact remains that often it is not the desire of the testator to prefer the issue of a deceased relative. In Ohio an adopted child is considered issue under this statute,<sup>34</sup> while a husband or wife, though next of kin under the statute,<sup>35</sup> is not considered relative.<sup>36</sup>

I believe it essential, therefore, that every testator be advised what disposition would be made of his property in the event the prime object of his gift should predecease him or die within thirty days of his death. It is my suggestion that he provide for a first and second alternate beneficiary. In other words, I feel that a good draftsman should carry the succession of each gift at least three steps.

If you have the rare situation where a client desires to leave a gift to a person of his blood who has been adopted by a blood stranger, you must, under the present statute, identify ". . . such child by his adopted name or later acquired name."<sup>37</sup> This statute is unreasonable inasmuch as you might have a situation where the testator wishes to make a gift to a child adopted and, because of the statute providing that the record of adoption is not open for inspection,<sup>38</sup> be without knowledge as to the adopted child's newly acquired name. The statute relative to inheritance

<sup>31</sup> Ohio Rev. Code, Sec. 2105.21.

<sup>32</sup> *Ibid.*, Sec. 2105.06(g).

<sup>33</sup> *Ibid.*, Sec. 2107.52.

<sup>34</sup> *Flynn v. Breddecker*, 147 Ohio St. 49, 68 N. E. 2d 75 (1946).

<sup>35</sup> Ohio Rev. Code, Sec. 2105.06.

<sup>36</sup> *Schafer v. Bernhardt*, 76 Ohio St. 443, 81 N. E. 640 (1907); *Reformed Church of Union Town v. Wise*, 17 Ohio C. C. R. (1896); *Norwood v. Mills*, 1 Ohio N. P. 314 (1895).

<sup>37</sup> Ohio Rev. Code, Sec. 3107.13.

<sup>38</sup> *Ibid.*, Sec. 3107.14.



of an adopted child being strictly construed<sup>39</sup> means that a gift to "the child of my daughter who has been adopted," without specifically mentioning the adopted name, would fail.

Frequently the desired aims of a well meaning testator fail because he bases his general bequests on the value of his estate at the time of the execution of the will, which might be substantially more than its valuation at the time of death. In such situations, the residuary legatee or legatees who are frequently the prime object of the testator's bounty suffer because of the full payment of these bequests.

This result can be prevented by inserting in the will a suggested maximum amount for the general bequests with an added provision stating a fixed ratio between the total of the general bequest and the residuary estate. It is usually accomplished by a percentage formula providing that the general bequests "shall be no greater than a specified amount, but in no event greater than a certain percentage of the net distributable estate."

Special care also should be given in making a specific devise or bequest. For if the object in the gift is not an asset of the estate at the time of the death of the testator, it is adeemed, and the legatee will have no claim against the estate for any other comparable item or for money equaling the value of the adeemed gift.<sup>40</sup> Therefore, it might be wise to provide, in certain instances, that certain general items in possession at the time of death be subject to the gift.

A surviving parent may, by will, designate a testamentary guardian,<sup>41</sup> who may be a non-resident of the State.<sup>42</sup> By recent amendment, the surviving parent may name the same person both executor and guardian.<sup>43</sup>

I have found this often the persuasive argument in convincing a wife, with minor child or children, who is otherwise uninterested, of the necessity of the drafting of her will as well as the will of her husband. She thus can be assured that in the event her husband predeceases her, her minor children will be kept together as a family unit by a testamentary guardian of her choice. Prior to the making of such a designation, the person to be designated should be contacted by the parents to ascertain whether he or she will act. The will should also provide for a successor guardian in the event the person designated fails to qualify, or having qualified, fails to complete the guardianship.

Many times a situation arises where the client is divorced and hence a designation by him of a guardian, if the other parent be alive at his death, would be ineffective,<sup>44</sup> yet he wishes to be

<sup>39</sup> *Campbell v. Musart Society*, 72 Ohio L. Abs. 46, 131 N. E. 2d 279 (1956).

<sup>40</sup> *Bool v. Bool*, 165 Ohio St. 262, 135 N. E. 2d 372 (1956); page, op. cit., supra, n. 24, Sec. 1517; 41 Ohio Jur., Wills Sec. 738 (1935).

<sup>41</sup> Ohio Rev. Code, Sec. 2111.12.

<sup>42</sup> *Ibid.*, Sec. 2109.21.

<sup>43</sup> *Ibid.*, Sec. 2111.09 (passed 9/4/57).

<sup>44</sup> *In re Coons*, 20 Ohio C. C. R. 47 (1899).

assured that the divorced spouse will not handle the funds bequeathed to the guardian of the estate of the minors. The same situation arises when the testator, not a parent, wishes to make a gift to minors and he feels the natural parents would be unsuitable to act as guardians of the funds which are the subject of the gift. The vehicle to use in such situation is to appoint a testamentary trustee wherein the rights and duties and the results desired should be detailed with exactness. In such situations, although the natural parents, if suitable, could secure an appointment as guardians of the minors' estate, their claim upon the fund held in trust for the benefit of the minors would be limited so long as the trustee did not abuse his discretion in administration of the trust. In such situations, I provide that the amount of payments made for the benefit of the minors be determined by first taking into consideration the minors' sources of other income.

It is not always advisable to appoint the principal object of the testator's bounty, whether it be the surviving spouse, or another, as the executor. The testator should consider his closeness to the party being designated as executor, his honesty, his integrity, his astuteness, and the confidence the beneficiaries place in him. It goes without saying that the executor should be the person in whom the testator has the utmost confidence, the person whom he would consider his "alter ego," for the real heart of the will is often the executor. Many times, even though the wife is the sole legatee and devisee, her lack of familiarity with business, together with the emotional upset following as the result of the spouse's death, makes her a poor choice for executrix.

It is wise to provide for an alternate executor to qualify, in the event the named executor fails to qualify, or having qualified fails to complete the administration of the estate. Next, give the named executor adequate powers and, further, where confidence dictates, provide that bond be dispensed with in order to save costs. The maximum premium allowable to the fiduciary on his account is regulated by statute.<sup>45</sup> No bond is required if a corporate trustee is appointed even though bond is not dispensed with in the will.<sup>46</sup>

An "in terrorem" clause, the validity of which is well established generally,<sup>47</sup> and the principle of which is adhered to by the courts in Ohio,<sup>48</sup> will go far to discourage a dissatisfied heir-at-law from contesting if the amount bequeathed to him is sufficient, taking into consideration the size of the distributable estate, to place him in a position of a "half loaf being better than none." I say "sufficient" because recently the heirs in a case were not so discouraged where they were bequeathed \$200.00 each, and where the will set aside their inheritance under the law of intes-

<sup>45</sup> Ohio Rev. Code, Sec. 3929.15.

<sup>46</sup> *Ibid.*, Sec. 1107.14.

<sup>47</sup> 57 Am. Jur., Wills Sec. 1512; see No-Contest Will Clauses: A Comment, 24 U. of Chi. L. R. 672 (1957).

<sup>48</sup> 41 Ohio Jur., Wills Sec. 711 (1935).

tate succession would have been \$200,000.00. So in the "in terrorem" clause, grant an amount large enough to the beneficiary who is expected to cause trouble so that he will think twice before he forfeits what he already has. In all cases, whether an "in terrorem" clause is used or not, name the next of kin, so as to dispense with the suggestion, in the event of a contest, that the testator was not aware of the identity of his next of kin.<sup>49</sup> The testator should spell out the reasons for the disinheritance or limitation of gifts to the heirs-at-law, in the kindest but strongest language, keeping in mind that the original will goes to the jury room for deliberation. Be sure, in giving reasons for failure to adequately provide for those persons who have a right to contest,<sup>50</sup> that the language used will not subject the estate to a suit for libel. Since the probating of a will with a libelous statement in it perpetuates the defamation upon the public records, an action for damages will lie against the estate, and the one defamed may petition for the deletion of the libelous matter.<sup>51</sup>

In proper cases, a spendthrift trust should be created to protect a legatee against his own indiscretions.<sup>52</sup> However, claims of a particular kind, such as for alimony or for maintenance or support, may be effective against spendthrift clauses.

Recently, two Common Pleas Courts of Ohio have taken opposite views on the right to attachment of funds held under spendthrift trusts.<sup>53</sup>

Often, the testator is fearful of a successful contest of his will even though the aforesaid precautions have been taken. In this situation, it is the scrivener's duty to advise the testator of an Ohio statute which, though it may be far afield of subject at hand, can in certain cases guarantee the desired results. Though surprisingly rarely invoked, this statute affords a practical method for accomplishing the "assured" inheritance. Its application is unlimited. Its protection is boundless. Its procedure is simple, and its liabilities are most limited.<sup>54</sup> If properly complied with, this statute affords protection that no will can insure. It provides for the designation of an heir, and places the person designated, for the purpose of inheritance, as if he were "a child born in lawful wedlock."<sup>55</sup> With this definition in mind, let us explore the potentialities of the statute. Suppose that a client has no children, adopted children, or their lineal descendants. Her

<sup>49</sup> *Niems v. Niems*, 97 Ohio St. 145, 119 N. E. 503 (1917).

<sup>50</sup> Ohio Rev. Code, Sec. 2741.01.

<sup>51</sup> Page, *op. cit.*, *supra*, n. 24, Sec. 1768. See, *Libel In a Will: A Comment*, 24 Fordham L. R. 417 (1955).

<sup>52</sup> 37 Ohio Jur., Spendthrift Sec. 2 (1935).

<sup>53</sup> *McWilliams v. McWilliams*, 74 Ohio L. Abs. 535, 140 N. E. 2d 80 (1956); *O'Connor v. O'Connor*, 75 Ohio L. Abs. 420, 141 N. E. 2d 691 (1957).

<sup>54</sup> Rippner, *Wills Can Be Made "Unbreakable,"* 6 Clev.-Mar. L. R. 336 (1957).

<sup>55</sup> Ohio Rev. Code, Sec. 2105.15.

husband has predeceased her. She has a friend who has been most conscious of her welfare. She desires to insure that this particular person shall receive whatever estate she leaves upon her death as against brothers and sisters, her next of kin. During her lifetime, she is not interested in establishing a gift program, perhaps being reluctant to do so because of the size of her estate. By conferring the designation of "heir" upon the party whom she wishes to be the major beneficiary of her bounty, she can leave specific and general bequests to others, and leave the residue of her estate to the designated heir. The effect of this statute thus appears to be a case of "all to gain and nothing to lose" for the testator.

Aside from deterring will contests, the statute providing for the designation of an heir is also beneficial from the standpoint of inheritance taxes levied by the State of Ohio. A designated heir has a \$3,500.00 exemption and the tax on his inheritance begins at 1%. A stranger has no exemption, and his tax rate starts at 7%. This fact is most important, for it may well be the "selling point" to a doubting client. The client has created no irrevocable obligation by making the designation, but on the other hand can partially "disinherit" the State of Ohio as a beneficiary. To illustrate, let us assume that there remains on hand for distribution \$23,500.00. To a stranger, there would be a 7% Ohio inheritance tax, in the sum of \$1,645.00. A designated heir would pay a tax of but 1%, or \$200.00, a savings of \$1,445.00.<sup>56</sup>

Thus the benefits of Ohio Sec. 2105.15 can be summarized as follows: In a case where there are no surviving spouse, children or adopted children, nor their lineal descendants, the designated heir will inherit all under the law of intestate succession. Hence, no next of kin by blood can file an action to contest the will, since he is not as such "an interested party" within the statute.<sup>57</sup> The designator still has the right to leave property by will to others in all or in part, or to disinherit the designated heir; and if it should be found desirable after a year, he may set aside the designation. The statute makes the "choice" so simple, adequate, and protective. Every objective can be accomplished, plus the saving of big tax dollars.

In line with the provision relative to designation of heirs, as a result of a 1953 amendment of the Ohio Revised Code,<sup>58</sup> an illegitimate child can be deemed legitimate and be considered as one born in lawful wedlock by the filing and granting of an application in Probate Court.

Now, let us consider another aspect of the construction of a will. In an action to contest a will, the jury must be apprised that the sole issue for determination is whether the writing produced is the "last will or codicil of the testator."<sup>59</sup> Therefore, the jurors

<sup>56</sup> *Ibid.*, Sec. 5731.09-12.

<sup>57</sup> *Ibid.*, Sec. 2741.01.

<sup>58</sup> *Ibid.*, Sec. 2105.18.

<sup>59</sup> *Ibid.*, Sec. 2471.04.

are further instructed that the will must be sustained in its entirety or fail in its entirety.

Having feet of "common clay," jurors not only consider the evidence but can't help considering the fairness or unfairness of the provisions of the will which they have before them, although that which is admissible in evidence does not in and of itself affect the validity of the will.<sup>60</sup> Who are the beneficiaries and who will suffer if the will is set aside? Gifts to charities might well cause a jury to sustain a will without which the result might be otherwise. Therefore, in a particular case it might well be that gifts to religious or racial denominations or charities would be the determining factor in having a will sustained. After all, only nine of the jury members must concur in the decision.<sup>61</sup> Rather than call this "legal chicanery," let us say the jury is "killing two birds with one stone"—the disinheriting of an heir-at-law on the one hand and the helping of charity—on the other. However, if the charitable gifts are out of proportion to the amounts given to the next of kin, it might have an opposite effect because of the "charity-begins-at-home" theory. Often, we have jurors who remember that they themselves, or their families or friends, have been "disinherited" because of charitable-minded ancestors. The "bad taste" for large charitable contributions has stayed with them.

Occasionally, we have a client who is a collector, and by will, wishes to make bequests of numerous items to various friends. In such a situation, rather than expending the time to have the bequest enumerated to the scrivener, or to make an unnecessarily lengthy document, it might be well to have the client at his leisure set forth his desires in a separate instrument. As long as the instrument is in existence at the time the will is executed and is properly identified in the will, it can be incorporated by reference as specifically provided by statutory authority in Ohio.<sup>62</sup>

Therefore, provide specifically for the dispensing of appraisal of the household goods and furniture by exercising the right given by statute;<sup>63</sup> otherwise, it has been held that each and every article must be meticulously listed.<sup>64</sup>

If your client is operating a business at the time of the drafting of the will, or is contemplating the acquisition of a business, whether it be incorporated or unincorporated, it is generally wise to give to the named executor, along with his general powers, the specific right to continue business, spelling out in detail the discretionary rights you wish him to have in its continued operation and possible sale or liquidation. Without this authority, the executor can only continue the business for thirty days. Then only

<sup>60</sup> 57 Am. Jur., Wills Sec. 106; 41 Ohio Jur., Wills Sec. 77 (1935).

<sup>61</sup> Ohio Rev. Code, Sec. 2315.09; 41 Ohio Jur., Wills Sec. 406 (1935).

<sup>62</sup> Ibid., Code, Sec. 2107.05; Page, op. cit. supra, n. 12, Sec. 249.

<sup>63</sup> Ibid., Code, Sec. 2115.08.

<sup>64</sup> In re Estate of McConney, 70 Ohio App. 286, 51 N. E. 2d 239 (1942).

upon application and giving of notice and with the approval of the Probate Court may be continued.<sup>65</sup> The statute further provides that the executor then must file monthly reports in the Probate Court showing all receipts and expenses and other pertinent information which the court may require. Not only is the executor of business, but he encounters the filing of the monthly report limited to certain statutory restrictions in the reports which are public record. This gives notice to the world, and specifically to his competitors, of the secrets of the firm's operations, to the obvious detriment of the business. I suggest that the authority to continue the business, as outlined above, be given to the executor even though the business be a corporation where the controlling shares are in the estate, for in such situations, it is questionable whether the executor has a right to continue the operation of business without court order.<sup>66</sup>

If the testator is a member of a partnership, be sure to check the articles of partnership to be certain that they provide for disposition of the partnership on death. Otherwise, do so specifically by will, providing, in addition, that the inventory and appraisal of partnership assets be dispensed with.<sup>67</sup>

Should your client have property over which he has the power of appointment, the property which is being given should be specifically identified, for it is held in Ohio that the exercise of the power must thereunder be clearly apparent, otherwise the property will not pass.<sup>68</sup>

If you have such confidence in your non-corporate executor that you wish to authorize him individually to have dealings with the estate, you should provide so specifically in the will. Then, and only with the approval of the Probate Court, can the executor act accordingly.<sup>69</sup>

In a will, you can further expressly authorize your individual or corporate executor to make advancements.<sup>70</sup> The advancement provision is often advantageous to the estate in order to forestall the selling of assets at a sacrifice in order to pay debts and taxes.

If the testator wishes his surviving spouse to receive only what she is given under the will, he should specifically state that the gift to her shall be in lieu of her year's allowance,<sup>71</sup> in lieu

<sup>65</sup> Ohio Rev. Code, Sec. 2113.30.

<sup>66</sup> 33 C. J. S., Executor & Administrators Sec. 193, 194; *Pfeiffer v. Michigan Trust Co.*, 275 Mich. 237, 266 N. W. 368 (1936); *In re Estate of Louis F. Nonnast*, 300 Ill. App. 537, 21 N. E. 2d 796 (1939); *Nonnast v. Northern Trust Company*, 374 Ill. 248, 29 N. E. 2d 251 (1940).

<sup>67</sup> Ohio Rev. Code, Sec. 1779.08.

<sup>68</sup> *Bishop v. Rempley*, 11 Ohio St. 277 (1860); *Arthur v. Odd Fellows*, 29 Ohio St. 557 (1876); *Kepplinger v. Armstrong*, 34 Ohio St. 348, 171 N. E. 245 (1930).

<sup>69</sup> Ohio Rev. Code, Sec. 2109.44.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, Sec. 2117.20.

of property exempt from administration,<sup>72</sup> and use of the mansion house.<sup>73</sup> Failure to so provide gives her these statutory rights as well as the property under the will.<sup>74</sup> It should be noted that a husband, in no event, is entitled to a year's allowance.

Although a spouse has the statutory right to elect against the will,<sup>75</sup> this right must be exercised within nine months or she is conclusively presumed, subject to exceptions under certain fact situations, to take under the will.<sup>76</sup> However, even if the spouse fails to make the election against the will within nine months, the widow would still be allowed the statutory exemptions, year's allowance, use of the mansion house and exempted estate unless the will provides otherwise.

Hence, if you have the rare situation where your client wishes to disinherit his spouse or give the wife a most nominal gift in lieu of the use of the mansion house and year's allowance and property exempt for administration, and if she doesn't elect within the required nine-month period, it would appear to follow that she would also lose her statutory rights, having been "conclusively presumed to take under the will."<sup>77</sup> I know of no case where this question has been resolved, but it is worth a try.

It is a "must" that the attorney who drafts the will always shall act as one of the witnesses, so that in the event of a contest he can testify fully as to the conversation with the decedent and the incidents leading up to and surrounding the execution.<sup>78</sup> Being a witness to the will, he is not barred by the attorney-client privilege statute,<sup>79</sup> for the courts have held that where an attorney is a witness to a will, the testator has impliedly waived the privilege.<sup>80</sup> The attorney should not be forced to sit idly by while the contestant proves that the will is the result of "undue influence" or "mental incompetence" when the attorney himself possesses the facts which absolutely refute the contestant's case.<sup>81</sup>

However, if the attorney who drafts the will is to be named the executor, it is still a "must" as aforesaid, that he act as one of the witnesses, but he should further have at least two other qualified witnesses subscribe to its execution.

Although it has been held that a witness-executor or witness-trustee is not an incompetent subscribing witness,<sup>82</sup> the

<sup>72</sup> *Ibid.*, Sec. 2115.13.

<sup>73</sup> *Ibid.*, Sec. 2117.24.

<sup>74</sup> *Ibid.*, Sec. 2107.42.

<sup>75</sup> *Ibid.*, Sec. 2107.39.

<sup>76</sup> *In re Estate of Bersin*, 98 Ohio App. 432, 129 N. E. 2d 868 (1955).

<sup>77</sup> Ohio Rev. Code, Sec. 2107.41.

<sup>78</sup> Rippner, *op. cit.*, *supra*, n. 54.

<sup>79</sup> Ohio Rev. Code, Sec. 2317.02.

<sup>80</sup> *Knepper v. Knepper*, 103 Ohio St. 529, 134 N. E. 476 (1921).

<sup>81</sup> Platz, *The Competency of Attorneys and Physicians To Disclose Privileged Communication In Testamentary Cases*, 1939 Wis. L. R. 339.

<sup>82</sup> *Blanker v. Lathrop*, 154 N. E. 2d 95 (Ohio, 1958); *Fazeka v. Gobozy*, 78 Ohio L. Abs. 258, 150 N. E. 2d 319 (1958); See Page, *op. cit.*, *supra* n. 12, Sec. 325.

question may arise wherein his appointment is attacked in the Probate Court on the grounds of suitability.<sup>83</sup> Though it has been suggested that, as a matter of professional ethics, a lawyer should not be a subscribing witness where he has been named as executor and/or trustee under a will,<sup>84</sup> it is the primary duty of the attorney-scrivener to take all ethical precautions to sustain the wish of the testator. I suggest emphatically that where the attorney-scrivener is an object of the testator's bounty, the will should be drafted by some other attorney who is in no way associated with the scrivener, in order to avoid all suggestion of "undue influence."

Often, the testator wishes to insure the proper administration of his estate by designating counsel to act as attorney of record for the estate. By great weight of authority,<sup>85</sup> which is followed in Ohio,<sup>86</sup> an executor and trustee is not bound to employ the designated attorney. One of the reasons suggested is that a fiduciary shall not be hampered in the management of the estate's affairs by being forced to work with an attorney not of his own choosing. Should a testator feel so keenly about the desirability of suggesting the attorney to represent his estate, but not wishing to designate him as executor or co-executor, it might be feasible to make the executor's appointment a condition precedent on his designating the suggested counsel as attorney of record. The enforceability of such a condition is open to question, but it is another "all to gain" provision.

Each page of the will should bear the signature or initials of the testator and the date, in order to avoid any suggestion of substitution of pages.

A "made to order" attestation clause is all important, for, besides being strong evidence that the will was properly executed,<sup>87</sup> it serves as an authoritative memorandum to refresh the memories of the subscribing witnesses. It should contain a recital that all statutory requirements have been fulfilled. It should recite the number of pages of which the will consists. It should contain the date for the obvious reason that it determines whether it be the last will. If there are any erasures or corrections, they should be referred to in the attestation clause, as well as being initialed where made by the testator; otherwise, the presumption is that they were made after the execution and

<sup>83</sup> Ohio Rev. Code, Sec. 2113.05.

<sup>84</sup> *Prothero v. Davies*, 149 Kan. 720, 89 Pac. 2d 890 (1939).

<sup>85</sup> *Scott, Testamentary Direction to Employ*, 41 Harv. L. Rev. 709 (1927); See Recent Decisions: *Wills—Direction to Employ Certain Attorney For Probate*, 36 Marq. L. R. 211 (1952).

<sup>86</sup> *Sherrnick*, 19 Ohio L. Abs. 461 (1935); See Recent Cases: *Attorney-Testamentary Directions to Employ-Wills*, 10 U. Cin. L. R. 104 (1936); *Contra*; *Rivet v. Battlesella*, 167 La. Ann. 766, 120 So. 289 (1929); *In re Johnson*, 199 L. Ann. 743, 7 So. 2d 40 (1942).

<sup>87</sup> *Thompson*, op. cit., supra, n. 16, Par. 132; Also *In re Shultz Estate*, 102 Ohio App. 486, 136 N. E. 2d 730 (1956).



hence of no effect.<sup>88</sup> However, in all cases where time permits and there is no emergency, retype the will or pages rather than correct, interlineate or change by hand. If the testator is under any physical disability, as aforesaid, suggest the same in the attestation clause to show that the witnesses, as well as the testator, were apprised of the testator's physical condition at the time of execution of the will. Testimony of the subscribing witnesses at the time of contest affirming that the testator had testamentary capacity, though physically disabled, is merely a reaffirmance of their previous statement at the time of attestation and should have certain probative value for the jury.

The witnessing of the will is all important because generally it is the witnesses' disinterested testimony which is the determining fact considered by a jury in an action to contest. In cases where the "red light" of contest hovers, the witnesses should never be persons who, after a casual introduction to the testator, are asked to act as subscribing witnesses. The ideal situation is to have as witnesses, person of long acquaintance, younger than the testator, and who probably will survive him. Practically speaking, it is wise to choose persons who will probably be available to testify when the will is presented to be probated. Intelligent and forthright people who know the provisions of the will and the reasons they are so made, make the most desirable witnesses.

As previously suggested, this type of witnesses' testimony will go far in sustaining the will. If, however, the securing of such witnesses is not feasible and associate counsel or employees in your office are available, do more than have their meeting with the testator a casual "howdy do." Explain to the client the importance of the testimony of these witnesses in the event of a contest, in order that they may engage your client in conversation to determine for themselves his or her testamentary capacity. A noonday luncheon prior to the execution of the will is a suggested procedure. The witnesses can then make written notes as to their opinions and place their findings with the conformed copy of the will retained by the scrivener.

I suggest using a minimum of three witnesses, though only two need appear in Probate Court and offer their testimony.<sup>89</sup> In the event of a contest, the third witness might add much to assist the will being sustained; on probate, one of the witnesses' testimony might not be easy to secure and the testimony of the remaining two will suffice.

When the testator is in the hospital, the attending physician or nurses will generally offer their full cooperation in describing "testator's condition" so as to leave the witnesses with no mental reservations as to the testator's testamentary capacity.

<sup>88</sup> *Brundige v. Benton*, 9 Ohio Dec. Reprint 786 (1887); Page, *op. cit.*, supra, n. 1, Sec. 887.

<sup>89</sup> Ohio Rev. Code, Sec. 2107.14.

If the testator, as the result of his disability, is without voice, handwritten notes of instruction written by the testator should be shown to the witnesses and kept with the will to establish that it was drawn in accordance with the testator's request and desires.

If you have a situation where a testator, though under guardianship, is lucid, I suggest the use of at least two psychiatrists as witnesses. On examining your client prior to the execution of the will, they should make written findings of their diagnosis, the originals of which you will attach to the will. The law recognizes that a will executed in a lucid interval by one who was before and afterwards, a confirmed lunatic, is valid.<sup>90</sup> When the question of lucid intervals is pertinent, it becomes especially advisable for the physician to be present at the specific time the will is being discussed by testator. Attorneys too often fail to take advantage of the opportunity of having a psychiatrist present at such time if they anticipate a possible contest concerning testamentary capacity. The psychiatrist can also serve as an advisor to the attorney by pointing out when rare lucid intervals can be expected for the particular testator, e.g., the phenomenon of mental fatigue in senile individuals would make it appear advisable to execute the will early in the day.<sup>91</sup> In addition to the professional medical witness, I would have, other than the scrivener, three witnesses of long acquaintanceship with the testator.

A voice recorder is an excellent instrument to use to fully record the statements made at the time of the execution of the will and its use as evidence has been sustained by the Supreme Court of Illinois;<sup>92</sup> the court there held that the recording is a mechanical rather than a human witness and that this should not render the evidence incompetent, provided a proper foundation is laid for its admission. In such cases, I suggest the use of a wire or tape that can record for at least an hour, so as to avoid the possible necessity of changing. In using the recording, have the testator and witnesses identify themselves audibly. Then, have the testator proceed to read the will and have its contents discussed at length with the witnesses with whom he acquaints in detail the reasons for the preferring or disinheriting of parties. As he signs the will, he indicates what he is doing, as do the witnesses. At no time is the instrument turned off until the recording is completed.

Even if the tape is held inadmissible, it would go far in refreshing the memories of the witnesses to the will and even in an office preview might discourage a contestant or his attorney if the "dead were to speak" indicating his reason for the partial or total disinheritance of the contestant.

<sup>90</sup> *In re Will of Ruth M. Cox*, 139 Me. 261, 29 A. 2d 281 (1942).

<sup>91</sup> *Usdin, The Psychiatrist and Testamentary Capacity*, 32 Tul. L. R. 89 (1957).

<sup>92</sup> *Belfield v. Coop*, 8 Ill. 2d 293, 134 N. E. 2d 249 (1956).

Based upon the above procedure, the possibility of making what is known as a "talking movie" of the signing of a will where the facts or size of the estate warrant it, intrigues me.

Another precaution—never have a beneficiary within "ear-shot" at the time of the execution of the will, for certainly on contest the allegation would be made of "undue influence."

Wills should never be executed in duplicate, for the retention of one and the loss of the other might give rise to a refusal to probate on the grounds that the will was revoked.<sup>93</sup> The last will is the one which, in the sense of time, is executed the latest. This could mean then that the carbon copy is in fact the last will.

A recommended procedure is to have the two copies of the will conformed after it has been executed by typing in all of the handwriting which appears on the original. One of such conformed copies is to be given to the client to be kept at home for review and the other retained in the attorney's office. The original generally is kept by the client in a safe deposit box.

When a very slight change is involved or where there is not sufficient time in which to prepare a new will, codicils may be utilized as temporary measures which are subsequently to be replaced by a new will. Do not use a codicil when it will disappoint some legatee or devisee, since the original testament will show the testator's original intention. Avoid "as a plague" the making of a codicil whenever a major change is being made in a will, for the obvious reason that the difficulty of interpretation becomes doubled. However, if in the original will charitable bequests have been made, the scrivener should advise his client, if he has issue or adopted children or lineal descendants of either, that the making of a new will will invalidate the gifts to charities should he die within one year after its execution.<sup>94</sup> In such a case, a codicil, regardless of a major change, might be the only solution, for it has been held in Ohio that a codicil executed within one year of the testator's death revoking bequests and thereby increasing residue, is valid.<sup>95</sup> In any case, for convenience's sake, try to have the same witnesses for the codicil as for the original will.

If your client is in fear of impending death and desires to make gifts to charities, it might be well to consider the creation of an inter vivos trust which is not subject to the mortmain statute.<sup>96</sup>

Even though a will has been carefully considered and drawn, it needs to be periodically checked over to see if any change in the law or in the circumstances of the testator require an alteration in the estate plan. If a person will visit his dentist semi-an-

<sup>93</sup> *In re Woods*, 61 Ohio L. Abs. 548, 105 N. E. 2d 589 (1951).

<sup>94</sup> Ohio Rev. Code, Sec. 2107.06.

<sup>95</sup> *Ruple v. Hiram College*, 35 Ohio App. 8, 171 N. E. 367 (1928).

<sup>96</sup> Ohio Rev. Code, Sec. 2107.06; also *Cleveland Trust Company v. White*, 134 Ohio St. 1, 15 N. E. 2d 627 (1938).

nually to protect the health of his teeth, he certainly ought to discuss his estate plan with his lawyer at least every two years to protect its "health."

Periodic revision of a will is a natural, important function. Wills should be reviewed just as one reviews the balance sheet of a business.

Section 1 of Rule XXVIII of the Supreme Court of Ohio, "Rules of Professional Conduct," adopts the Canons of Ethics of the American Bar Association. Although Section 2 of Rule XXVII provides that an attorney shall not solicit professional employment, Opinion 21 of the American Bar Association, March 15, 1941, Reconsidered and Approved June, 1942, states: "Where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in his will. Periodic notices might be sent to the client for whom a lawyer has drawn a will suggesting that it might be wise for the client to reexamine his will to determine whether or not there has been any change in his situation requiring a modification of his will." The opinion even states the reasons back of its statement that such advice is not improper. These are legally significant events which occur between the execution of the will and the death of the testator. Their consequences should manifestly be pointed out to the testator by his lawyer because otherwise the testator may not be aware of the seriousness of these changes in the law or fact.

Many of the advantages of good drafting and estate planning mentioned in this article can be demonstrated by the lawyer to his clients. As a result, their attitude will be changed from one which begrudges a small fee for what they think is a legal stenographic job to a feeling that they are getting a bargain in paying liberally for a plan that will protect their savings during the future years.