Evidence in Estate Matters, Lost Wills, Self-Proving Wills, Proof of Will, Unavailable Witnesses, Holographic (Handwritten) Wills

Honorable Laurie Hall

Probate Judge

Marengo County

Honorable Will Tate

Probate Judge

Crenshaw County

Probate Judge Conference

March 3-6, 2019

Prattville, Alabama

SESSION 4

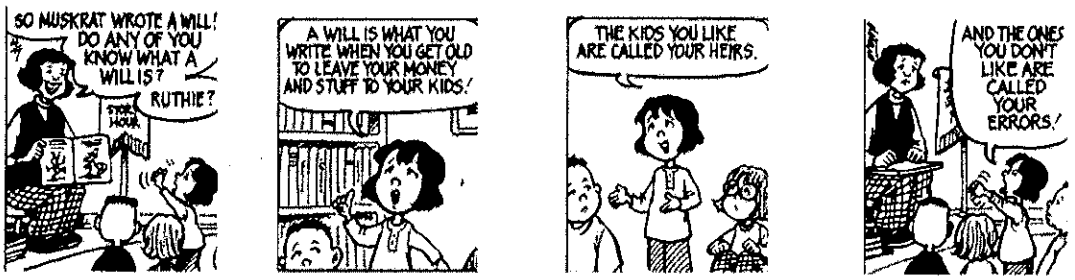
Evidence in Estates, Lost Wills, Self-Proving Wills, Proof of Will, Unavailable Witnesses, Holographic Wills

Hon. Laurie Shoultz Hall – Marengo County

Hon. Will Tate – Crenshaw County

WHAT IS A WILL?

WHAT IS A WILL?



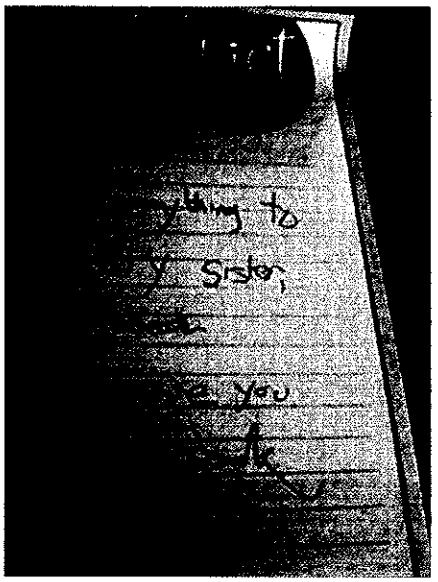
A person's declaration of how he/she desires his/her property to be disposed of after his/her death

Most people want their possessions and assets to go to the people they love when they pass away. One way to assure this happens is to create a valid will that can be probated. Without a will, the intestate laws of estate succession in your state will apply to your estate. This may mean your sister you hate or the child in prison that you wanted to disinherit because of a judgment or debt he or she owes may inherit against your wishes.

The following table describes the main Alabama wills laws.

Code Sections	Alabama Code Title 43: Wills and Decedents' Estates
Age of Testator	Any person who is 18 years or older and "of sound mind" can make a will. For wills, a sound mind is a low threshold. A person can have some mental illness or intellectual disabilities and still create a will if they understand the nature of what they have and who they'd like to give it to.
Number of Witnesses	Wills must be signed by the testator (the person the will is for) in the presence of two witnesses who also sign the will. Alternatively, the testator can have a person sign the will at his or her direction in front of the witnesses, this is good for those who can't write or who are too ill to write. The witnesses must be competent and can have an interest in the will, although this may not be the best choice of a witness.
Oral (Nuncupative) Wills	Alabama, like most states, doesn't recognize oral or "nuncupative" wills. Generally, the minority of states that do accept these oral wills only do so in limited circumstances, such as an emergency situation where the person is on his or her deathbed and tells two or more witnesses of what he or she wants in the will.
Holographic (Handwritten) Wills	Alabama, unlike some states like Texas, doesn't recognized wills only handwritten by the testator. This is because of the statutory requirement that every will must be witnessed and attested to by at least two people. A will that is handwritten by a testator and also attested to by two witnesses is not considered a holographic will, but a will that follows the statutory requirements.
Revocation of Wills	A will or any part of a will can be revoked by a subsequent will which either revokes the will expressly or by a change or inconsistency. Wills can also be revoked by burning, tearing, or destroying with the intent of revoking. However, if a person other than the testator physically destroys the will, it must be at the direction of the testator and proved by two witnesses to be at the testator's request.

HOLOGRAPHIC WILLS



Alabama does not recognize handwritten wills unless they meet all statutory requirements (in writing, two witnesses, etc.)

MAKING A WILL

MAKING A WILL

Section 43-8-130

Who may make a will.

Any person 18 or more years of age who is of sound mind may make a will.

Section 43-8-131

Execution and signature of will; witnesses.

Except as provided within section 43-8-135, every will shall be in writing signed by the testator *or in the testator's name by some other person in the testator's presence and by his direction*, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

EVIDENCE IN ESTATES

RULES AND EVIDENCE IN PROBATE COURT

Alabama Rules of Civil Procedure

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1.

Scope of Rules.

(a) Scope. These rules govern procedure in the circuit courts and in Courts of full, like jurisdiction, in the district courts as provided in subparagraph "(dc)" of each rule, in the small claims courts as provided in Rule N of the Alabama Small Claims Rules, **in probate courts so far as the application is appropriate and except as otherwise provided by statute**, and in all other courts where appeals lie directly to the Supreme Court or the Court of Civil Appeals, in all actions of a civil nature, including those in which the State of Alabama or a political subdivision thereof is a party, whether cognizable as cases at law or in equity before the adoption of these Rules of Civil Procedure, and in proceedings enumerated in Rule 81.

SELF-PROVING WILLS

SELF PROVING WILL

Section 43-8-132

Self-proved will - Form and execution; how attested will made self-proved; effect.

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

"I, _____, the testator, sign my name to this instrument this _____ day of _____, 19__, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence."

_____
Testator

"We, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence."

_____
Witness

_____
Witness

State of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____, 19__.

SEAL (Signed) _____

_____
(Official Capacity of Officer)

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

"STATE OF _____

COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 years of age or older, of sound mind and under no constraint or undue influence."

_____

Testator

_____

Witness

_____

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____, 19____.

SEAL (Signed)_____

_____

(Official capacity of officer)

(c) If the will is self-proved, as provided in this section, compliance with signature requirements for execution is conclusively presumed, other requirements of execution are presumed subject to rebuttal without the testimony of any witness, and the will shall be probated without further proof, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

Section 43-8-133

Self-proved will - Making attested will self-proved.

An attested will may be made self-proved through compliance with section 43-8-132 or as otherwise provided by law.

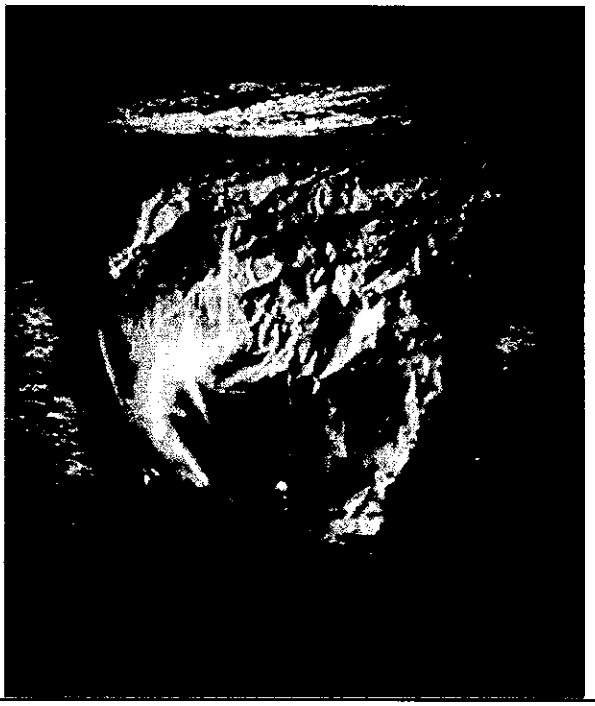
Section 43-8-134

Who may witness will.

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

REVOCATION OF A WILL



REVOCATION OF A WILL

IN ALABAMA: When a Will remains in the possession of the testator and is not found at the testator's death, the legal presumption is that the testator revoked the Will.

Section 43-8-136

Revocation by writing or by act; when witnesses required.

(a) A will or any part thereof is revoked by a subsequent will which revokes the prior will or part expressly or by inconsistency.

(b) A will is revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence by his consent and direction. If the physical act is by someone other than the testator, consent and direction of the testator must be proved by at least two witnesses.

Section 43-8-137

Revocation by divorce or annulment; revival by remarriage; no revocation by other changes or circumstances.

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of section 43-8-252(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

Section 43-8-138

When will revived on revocation of subsequent will.

(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under section 43-8-136, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations in writing, signed by the testator and attested as prescribed in section 43-8-131, that he intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

PROOF OF WILL

PROOF OF WILL

Section 43-8-167

Mode of proving will generally.

(a) Wills offered for probate, except nuncupative wills, must be proved by one or more of the subscribing witnesses, or if they be dead, insane or out of the state or have become incompetent since the attestation, then by the proof of the handwriting of the testator, and that of at least one of the witnesses to the will. Where no contest is filed, the testimony of only one attesting witness is sufficient.

UNAVAILABLE WITNESS IN PROOF OF WILL

"If you have nothing to hide, why are you hiding?"

(b) If none of the subscribing witnesses to such will are produced, their insanity, death, subsequent incompetency or absence from the state must be satisfactorily shown before proof of the handwriting of the testator, or any of the subscribing witnesses, can be received; in addition to the methods already provided, the will of a person serving in the armed forces of the United States, executed while such person is in the actual service of the United States, or the will of a seaman, executed while such seaman was at sea, shall be admitted to probate when either or all of the subscribing witnesses is out of the state at the time said will is offered for probate, or when the places of address of such witness or witnesses are unknown upon the oath of at least three credible witnesses, that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal property of all kinds.

Section 43-8-168

Depositions of witnesses.

When the subscribing witnesses, or any of them, reside out of the state, or are physically unable or in any case in which depositions are authorized to be taken in circuit court, the judge of probate may issue a commission to take the testimony of such witnesses in proof of such will.

Section 43-8-169

Recordation of witnesses' testimony.

If it appears, on the proof taken before the judge of probate, that the will was duly executed, the testimony of the witnesses must be reduced to writing by him, signed by the witnesses and, with the will, immediately recorded in a book provided and kept for that purpose.

Section 43-8-170

Certificate endorsed on will.

Every will so proved must have a certificate endorsed thereon, setting forth in substance that such will had been duly proved and recorded, with the proof, specifying also the date of the probate, the book in and page or pages on which it is recorded. Such endorsement must be signed by such judge of probate.

Section 43-8-171

Admission of will in evidence.

Every will, so proved or endorsed, may be read in evidence in any court of the state, without further proof thereof; and the record of such will and proof or a transcript thereof, certified by the judge of probate, must be received as evidence to the same extent as if the original will was produced, and the same proof made.

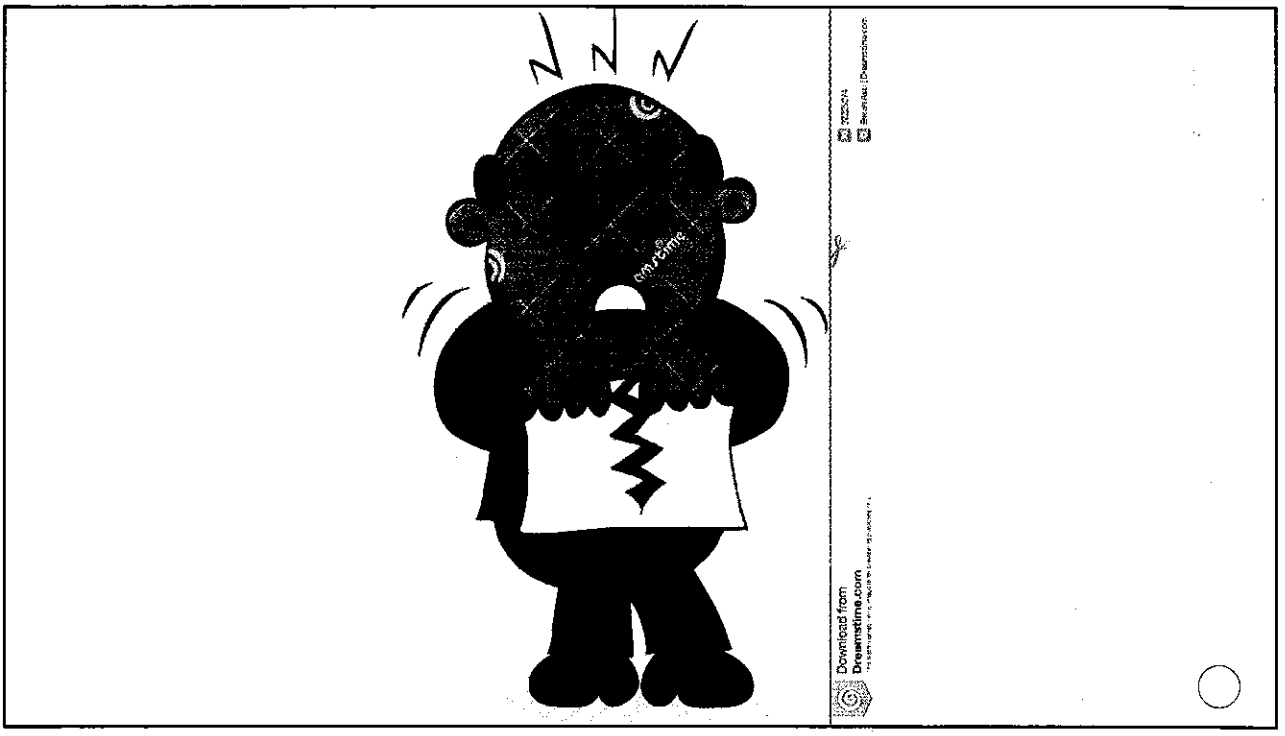
CUSTODIAN OF WILL

Section 43-8-270

Duty of custodian of will after death of testator; liability.

After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court. Any person who willfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who willfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to the penalty for contempt of court.

LOST/DESTROYED WILL



LOST OR DESTROYED WILL

Barksdale v. Pendergrass, 294 Ala. 526, 529, 319 So. 2d 267, 269-90 (1975):
In a proceeding to probate an alleged lost or destroyed Will, the burden is on the proponent to establish, to the reasonable satisfaction of the Judge or jury trying the facts:

1. The existence of a will – an instrument in writing, signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.
2. The loss or destruction of the instrument.
3. The nonrevocation of the instrument by the testator.
4. The contents of the Will in substance and effect.

In regards to #3, the Supreme Court of Alabama explained, "When the Will is shown to have been in the possession of the testator, and is not found at his death, the presumption arises that he destroyed it for the purpose of revocation; but the presumption may be rebutted, and the burden of rebutting it is on the proponent."

Spencer III v. Spencer – Appeal from Mobile Probate Court No. 2016 – 0862 (1161095)
https://law.justia.com/cases/alabama/supreme-court/2018/1161095.html

LOST WILL EXCEPTION:
The lost Will exception, a product of the common law, has been preserved and read into the statute so that a "lost Will may be established by the testimony of a single witness, who read it, or heard it read, and remembers its contents." *Lovell v. Lovell, 270 Ala. 720, 121 So.2d 901 (1960).* "The exception, which relaxes the requisite proof for probate in a lost Will, is in keeping with the public policy of this State in carrying out the last intent of the testator." *Anderson v. Griggs, 402 So.2d 904 (Ala. 1981).* While an essential element in proof of the establishment of a lost Will is assertion of knowledge of contents of such a Will, in proving, the contents of a lost instrument as a Will, it is not necessary to prove words of an instrument; proof of substance of contents is all that is required. *Anderson v. Griggs, 402 So.2d 904 (Ala. 1981).*