



# Paralegal Division of the State Bar of New Mexico

Brown Bag Discussion Group

August 18, 2021

Presented by: Linda Sanders

# Definition: NMSA 1978 45-1-201(A) (57)

"will" includes a codicil and any testamentary instrument that merely appoints a personal representative, revokes or revises another will, nominates a guardian or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. "Will" does not include a holographic will.

“holographic” in the decedent’s writing, dated, signed but that is NOT witnessed.  
Restatement of the Law 3.2

# What does it do?

- Appoints a personal representative: person with the authority to dispose of the assets
- Directs the disposition of assets after the death of an individual, 45-2-601
  - A separate devise of tangible personal property 45-2-513
    - *Estate of Boyer*, 1994-NMCA-005

# What does it NOT do? 45-6-101

- Control non-probate transfers on death:
  - Joint tenancy assets
  - Payable on Death designation
  - Beneficiary designation
  - Transfer on Death
  - IOU

# Why is a Will necessary?

- Statutes regarding testacy v. intestacy differ
  - Any part of a decedent's estate not disposed of by a will passes to the decedent's heirs by intestate succession
    - Share of the spouse: 45-2-102
    - Share of heirs other than surviving spouse: 45-2-103

# Requirements:

- NMSA 1978 Chapter 45 Article 2: Intestate Succession and Wills Part 5: Wills
  - Who can make a will? 45-2-501
    - *Estate of Head*, 1980-NMCA-096
      - Defines testamentary capacity:
        - Lucid at the time of signing
        - Knows the extent of bounty
        - Knows how wants bounty distributed
    - *Chapman v. Varela*, 2009-NMSC-041
      - UPC distinguishes conservatorship from guardianship; no prohibition on executing a will because a conservator has been appointed

- Execution: 45-5-502
- Who may witness: 45-2-505 and 11-601 NMRA
- Self-proved will: 45-2-504

- Electronic wills:
  - Uniform Electronic Wills Act
    - NOT adopted in NM
    - Would have to comply with 45-2-506
    - Effect on self-proved will
    - COVID and Executive Order regarding notarization



- Revocation: 45-2-507
  - *Albuquerque Nat'l Bank v. Johnson*, 1964-NMSC-055
  - *Perschbacher v. Moseley*, 1965-NMSC-068

## From a litigation perspective:

- Avoid lapse 45-2-702(A)
- Use “Per Stirpes” correctly 45-2-709(C)
- Correctly identify charitable beneficiaries
  - *Moore v. Bean*, 1970-NMSC-155
- Avoid “Under-Funding”
- Amendments vs. Restatements
- Ineffective No-Contest Clause
  - *Matter of Seymour’s Est.*, 1979-NMSC-069
- Select fiduciary(PR) wisely

# Guard Against Undue Influence:

UI is a process, not an event

*Brown v. Cobb*, 1949-NMSC-016

*Montoya v. Torres*, 1991-NMCA-152

*Chapman v. Varela*, 2009-NMSC-041

*Estate of Carpenter*, 253 So.2d 697 (Fla. 1971)

*Compromise of Controversies* 45-3-1101 and 45-3-1102

*Fortifying the plan*