Paralegal Division of the State Bar of New Mexico

Brown Bag Discussion Group
August 18, 2021
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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?

- Statues 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
  • *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**