

WILLS AND THE NEBRASKA PROBATE CODE

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GENERAL MATTERS

Many people, especially laymen, are under the presumption that the right to make a will is precisely that—a right. That is not the fact. There is no “right” to make a will. There is only a privilege so far as the legislature deems it desirable to extend that privilege. The privilege, at least in Anglo-Saxon law, derives from the Statute of Wills enacted under the reign of Henry VIII. We have no “right” in general under the common law except by statute to make wills. The Probate Code provisions which grant to the citizens of Nebraska the right to make a will are derived from a combination of the definition of a will in the Code and the express authority to make a will and dispose of property under section 30-2326. The Code provisions are equivalent to the Statute of Wills repealed by the Nebraska Probate Code. Former sections 30-201 and 30-202 were the Statute of Wills, the first dealing with disposition of real property and the second dealing with disposition of personal property. It has also formerly been the law, since there was no inherent right to dispose of property upon death, that if one tried to make a testamentary disposition without conforming to the requirements of the Statute of Wills, that disposition was simply nugatory. In a little noticed and not much commented upon provision of the Code, the door has been thrown open. We have in the Code a marvelous mechanism. Most of its parts are devoted to how one disposes of his property by testamentary provision, but then there is a beautiful little proviso that makes all of that irrelevant. That proviso is section 30-2714, which in effect says that one can make a valid “testamentary death-contingent disposition” which does not comply with requirements for the execution of a will. I suggest that one of the possibilities under that provision is the registration of Nebraska securities issued in the name of “A or transfer on death to B.” Section 30-2714 opens up a total range of possibilities that has not yet been explored and can become very significant. Prior law in Nebraska was that if you did not comply with the Statute of Wills, you made no effective testamentary disposition.

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There are a few other considerations before we get into the subject of wills, and these are more or less procedural matters. One of them is that the Code makes it easier to read and deal with probate matters by using common definitions so that we no longer have a whole range of terms to apply to basically the same thing, the same person or the same office. For example, the word "device" applies to a bequest, a legacy or some other transfer under a will. The term "personal representative" means the person acting in the representation of a decedent, either through a will or otherwise. Also, our new Nebraska Rules of Evidence have some bearing on the situation and apply specifically to one provision of the Code. The absence or unavailability of a will and how its terms are proven is covered in section 30-2426 (a) (3) of the Probate Code. The Rules of Evidence apply to this section in two important aspects. First, they repeal the Dead Man Statute, which deals with evidence inadmissible because one of the adverse parties is a personal representative of a decedent. This rule no longer applies when the construction of a will, in an action to which the personal representative is a party, is at issue. Second, the Rules provide an exception to the hearsay exclusionary rule. As a result, practically anything is admissible dealing with the execution, revocation, identification, or terms of a decedent's will, so that matters of proof are procedurally easier than in the past.

WILLS

FORMALITIES

Testamentary capacity and the function of a will are covered by section 30-2326. Any person can make a will if he satisfies two requirements. First, he has either to have attained the age of eighteen or to be an adult. This means that persons who are not adults but are eighteen or over may make wills. Also, persons under the age of eighteen, who are married and thereby become adults, may also make wills. This is a departure from both the Uniform Probate Code and the Nebraska Probate Code as originally proposed. Both would have deprived married people under the age of eighteen the right to make a will. The logic behind the revised provision is that if you are old enough to get married under Nebraska law you ought to be old enough to make a will. The other requirement is that the testator be of sound mind when the will is made.

The will can serve a number of functions. It can, and normally does, dispose of property. A will can also merely attend to adminis-

trative matters. For example, a will may appoint or nominate a personal representative, conservator, guardian or trustee. It might specify the manner in which the affairs of the estate will be conducted or serve simply as a modification of a prior will. The only limitation is the requirement under section 30-2401 that the estate be promptly settled. If a client did not want his estate promptly settled, he could so provide in his will and that provision would probably override section 30-2401.

Prior law, sections 30-201 and 30-202, provided that anyone of full age and sound mind could dispose of real and personal property by will.

Two primary forms of wills are recognized under the Code. One we might call the "standard will." A standard will is the will that normally would be prepared by an attorney for a client. There are several requirements concerning execution that this standard, lawyer-prepared will must meet under section 30-2327. First, it must be in writing. Second, the will must bear the signature of the testator. Two modes of signature are possible. The testator might actually sign the will. If the testator is in such a condition that he cannot sign his name, then his name may be signed for him by another person in his presence acting for the purpose of executing the will. The will must be witnessed by at least two individual witnesses. Each is required to sign his own individual signature to the will. The witnesses need not necessarily each have witnessed the same act in connection with the will. What they must have witnessed and signed as having witnessed is either: (1) the execution of the will by the testator or by some person acting for the testator and at his direction; or, (2) the testator's acknowledgement that it was in fact his signature on the will or that the document bearing the signature was in fact his will. Thus the witnesses can have witnessed one or another of these events. Under prior law, a will was required to be in written form, signed by or for the testator and signed by two or more attesting witnesses in the presence of the testator.

Another form of will permitted under the Code and not previously permitted in Nebraska is the holographic will, which is essentially a will prepared by the testator himself. Section 30-2328 covers holographic wills. It does not need to be witnessed, nor must it comply with requirements for the standard will. However, it must contain three items, each of which must be exclusively in the handwriting of the testator. The Code requires that the material provisions be handwritten by the testator. Such provision invites

speculation as to the extent to which a form will with the blanks filled in by the testator in his handwriting is sufficient.

The second requirement for a holographic will is that it must bear the signature of the testator written by the testator alone. The testator may not have someone else write the signature for him at his direction or anything of that nature.

The final requirement, and this is a departure from the Uniform Probate Code, is that there must be an indication of the date of the writing. Such requirement was recommended by the Troyer Committee. When dealing with self-drawn wills there will likely be more than one will. Consequently, the question arises as to which is the last holographic will. The requirement of dating was added to solve this problem. The will does not necessarily have to be dated, for example, "25 December 1975." The date could be drawn as "Christmas 1975," and would be adequate.

Under prior practice, holographic wills were not permitted in Nebraska except under the narrow exception of section 30-204(2), which incorporated the laws of other jurisdictions which permitted holographic wills. There was a requirement that the holograph be in writing.

A variety of wills formerly permitted is eliminated by the Code. There have been four or five cases which went to the Nebraska Supreme Court on the question of the validity of nuncupative wills. Even under our current statutes, the permissibility of nuncupative wills is very limited in scope. Nuncupative wills are not permitted at all after January 1, 1977.

Another provision new in Nebraska is the provision for self-proof. The section of the Code involved, section 30-2329, sets out a form for self-proof. The statute does not state that this is the only form that can be used. It does, however, provide that this form should be substantially followed. I recommend that if you depart from the statutory language at all, you do so very carefully.

There are several requirements for a self-proved will. First, the will must be attested, which simply means that the will must in fact have been witnessed. It is important to note that the absence of an attestation clause does not necessarily mean that the will was not attested. Second, the testator, together with the witnesses, must appear before a notary or some other similar public official and acknowledge the signatures on the will. The certificate must be in the statutory form or substantially the statutory form and attached or annexed to the will.

Self-proof is useful in two instances. Under our present

practice, even if there is no contest over the probate of a will, at least one witness or some equivalent must be produced. Sometimes the witnesses are not available and the handwriting of the testator has to be identified by sending a *dedimus* out of state or something to that effect. If there is no contest of the will, a self-proving certificate in effect eliminates this requirement and the will can be admitted to informal probate. If the will is not contested but is self-proved, it can be admitted to formal probate. If a contest does develop, there are still certain advantages of a self-proved will. There is a conclusive presumption that, in fact, the testator executed the will and a rebuttable presumption that the will otherwise satisfied the statutory requirements. The burden falls upon those contesting the will to prove that the will did not satisfy the other requirements for a valid will.

The planned Probate Manual will consider the question of whether or not there ought to be both an attestation clause and a self-proof form attached to a will. Although the matter is not yet fully settled, I think that the recommendation will be that you should use the standard attestation clause in addition to the self-proof if you are going to use a self-proved will. In other words, the self-proof form should not be relied upon as a substitute for the attestation clause. Our conclusion is that even if you do have self-proof, in order to have an attested will, you still have to have a document signed by all the witnesses and the testator. There is no way to avoid having them sign a second time on the self-proof form.

Section 30-2330 defines who is a qualified witness to the will. There have been some problems under prior law about interested witnesses. Under the Nebraska Probate Code, the fact that a witness to a will may have an interest therein does not necessarily invalidate the will. Generally, if an individual is competent to be a witness, that person may act as a witness to the will whether or not he is a beneficiary under some provision of the will. There are, however, certain consequences of having an interested person witness the will. If one of the witnesses to a will is not an interested witness, in other words someone who does not have a material interest under the provisions of the will, then the fact that there is an interested witness does not affect the provision for that interested witness. An interested witness is specifically defined in the Code as a witness who would take something of material benefit under the will, but does not include someone whose only interest in the will is that he is nominated as executor, trustee, personal representative, guardian, conservator or other official. An inter-

ested witness must be someone who would take something of value under the will, a devise of some kind, someone to whom a power of appointment is given or someone who is made the donee or the recipient of property subject to a power. If all witnesses to the will are interested, then the only share that they may take under the will is what would have been their respective intestate shares if the testator had died intestate rather than with the will which is offered for probate.

Current Nebraska law deals with both the qualifications of a witness and the consequences which follow when one of the witnesses is an interested person under the will. An interested witness is disqualified from taking under the will unless there are two other competent witnesses. This should be compared to the Code provisions wherein there is no disqualification unless all the witnesses are interested.

The Code provision, section 30-2331, on the question of the law governing the execution of the will seems to be very wide and flexible. Its foundation is the time and place of execution. Depending upon the various combinations that might exist, the law of a sovereign other than Nebraska may determine the validity of what purports to be a will. A foreign law of one kind or another may be applied depending upon the place of abode, the place of execution, the place of domicile and the place of nationality of the testator. Prior Nebraska law contained one provision, section 30-204(2), dealing with wills executed outside Nebraska. They were deemed valid if they were executed outside Nebraska in conformity with the law of the place of execution. Note that the Nebraska Probate Code will validate a will executed in Nebraska if it complies with the applicable laws of any of the "places" listed above, of which the place of execution is only one.

REVOCATION

Once a testator has a will executed he often wishes to revoke all or part of it. The Nebraska Probate Code, section 30-2332, and the Uniform Probate Code deal with a whole series of problems of revocation of wills. The usual situation is when the testator physically does something to the will intentionally for the purpose of revoking all or a part of it. There are many ways in which a will can be either partially or wholly revoked. A subsequent will can revoke all or part of a prior will. First, it is not necessary to have physical possession of the subsequent will, as long as there exists proof of the contents of that will. If there is proof as to

what a subsequent will provided and that proof has the effect of revoking all or part of a prior will, either because the subsequent will says "I revoke all prior wills," or because the subsequent will has provisions that are inconsistent with the provisions of the prior will, the prior will is revoked. A will can be revoked simply by acts upon the document itself, and the Code sets out certain requirements as to how this may be done. Prior law permitted revocation and partial revocation by inconsistency and also permitted, under section 30-209, a range of acts of revocation done to the instrument itself.

There is another form of revocation sometimes permitted under section 30-2333 of the Nebraska Probate Code. A change in the circumstances of the testator may sometimes effect a revocation of a will, as for example, the termination of marriage after the execution of the will. If the marriage is terminated subsequent to the execution of the will by annulment, dissolution or divorce (these acts are specifically defined in section 30-2355), the will is considered revoked to the extent of the provisions for the benefit of the ex-spouse. A decree of divorce from bed and board, for example, which does not in and of itself terminate the marriage relationship, does not have the effect of revoking any provision for the benefit of the separated spouse. This is a limited revocation. If the testator remarries the divorced spouse, then those previously revoked provisions are deemed revived as if they were never revoked. Also, a will may by its own terms expressly make some provision for the former spouse; and the terms of the will override the presumption of revocation.

No other changes in the status of the testator will create a presumed revocation of all or part of the will. There was no prior law specifically enumerating the changes like marriage or divorce that would revoke a will. A general provision did exist which provided that changes in circumstances might revoke partially or in full. There are several cases which deal with the question of marriage or divorce and its effect upon the will.

Nebraska also has, and probably will continue to have, the common law doctrine of dependent relative revocation. Basically the doctrine deals with a situation in which a testator intends to revoke a will subject to some condition; as, for example, effectively making a substitute will. In order for this doctrine to be invoked the conditional aspect of the revocation must be intended by the testator, and the new will must fail to take effect because the replacement will was not properly executed or some reason of that nature. Under these circumstances it is generally presumed that

the testator would prefer to die testate with the old will rather than intestate with no will at all. The Nebraska Probate Code and the Uniform Probate Code both intentionally omitted any reference whatsoever to the doctrine of dependent relative revocation, but the footnotes to the Uniform Code specifically indicate that the omission was intentional so that every state could continue to apply its common law doctrine in these circumstances. Unfortunately, the doctrine has never been developed or considered in Nebraska. Presumably, we would go along with the trend of common law decisions and recognize the general doctrine and it would be applicable under the Nebraska Probate Code.

Once a will has been revoked there are other ways of having it revived outside of dependent relative revocation. Normally the rule is that once a will is revoked, it stays revoked. However, there are peculiar situations which can arise and many states, including Nebraska, seem to have had several cases dealing with a series of wills. For example, Will No. 1 is executed; Will No. 2 is executed and provides, among other things, "I revoke Will No. 1." Then Will No. 2 is revoked. What happens to Will No. 2's revocation of Will No. 1? Is the revocation of the second will sufficient to revive the first will? There has been much litigation involving mysteriously disappearing and reappearing wills. The Nebraska Probate Code contains an attempt to codify the solutions to these types of problems. The Code outlines in great detail in section 30-2334 how the situations arise and the extent to which a revoked second will can have the effect of reviving the revoked first will. There can be either partial or complete revival depending upon the nature of the revocation of the prior will. Nebraska recognized a version of this doctrine at common law in *Williams v. Miles*, 68 Neb. 463, 94 N.W. 705 (1903).

EXTERNALITY

When drafting a will it is sometimes convenient not to dispose of all the testator's property under the will itself. The problems of draftsmanship and possible error can be greatly reduced if the will can validly refer to matters extraneous to the will. The Uniform Probate Code and the Nebraska version recognize four general areas of what might be called "externality." Section 30-2335 specifically approves and enunciates the doctrine of incorporation by reference. So long as the writing exists and can be identified and the testator's intent to incorporate the instrument can be established, the mere reference to the writing sufficient to identify it is enough to incorporate it into the will without a ver-

batim repetition in the will. There previously was no statutory provision governing this subject, but Nebraska more or less formerly recognized the principle by case law in *In re Dimmitt's Estate*, 141 Neb. 413, 3 N.W.2d 752 (1942).

A second drafting area wherein it is usually convenient to refer to some outside event or instrument is the question of transfers from an estate to another trust, not a trust created by the will but perhaps a trust created by another person's will or a trust created inter vivos by the decedent. Under section 30-2336 of the Nebraska Probate Code a fairly wide range of transfers to trusts is permitted with a variety of grantors allowed. The trust does not necessarily have to exist at the time the will is executed. All that is required is that the trust be identified by the terms of the will and that the terms of the trust are in fact set out in a writing that can be identified. The trust can be amended before the death of the testator and after the execution of the will and can possibly be amended even after the death of the testator. The existence of these possibilities of trust amendment does not necessarily invalidate the transfer to the trust and the fact that the trust may have been amended before death does not invalidate the transfer. The will may provide that the transfer is to be made to the trust as amended up to the time of death and may permit further amendment to the trust after death. If the will does not contain a provision for post-death amendment of the trust, the trust is frozen as of the time of death, no post-death amendments to the trust will affect the administration of the trust concerning the transfer under the will. This is an area to be kept in mind during will drafting—should the transfer to the trust be guided by post-death amendments to the trust instrument? If so, then adequate provision should be made in the will. If a transfer to a trust is made under the will and for some reason or another at the testator's death the trust has terminated because it served its purpose or ceased to exist for some other reason, the transfer will lapse and become null and void. A new trust is not created despite the fact that the prior trust has been terminated. Since the transfer to the trust simply becomes void an alternative trust could be drafted into the will or be incorporated by reference or as an event of independent significance and a new trust created if the old one has ceased to exist at the time of the testator's death. But provision should be made to avoid an automatic lapse. Prior law permitted transfers to trusts but these were limited. There could be no post-death modification whatsoever. If the trustee was not a corporate fiduciary or there was not a corporate fiduciary

among co-trustees, the trust could only be administered under court supervision. Under the Code the identity of the trustee does not affect the absence of court supervision.

Another area where wills can be drafted to reach outside their own terms is the area of events of independent significance. The act or event may be referred to in determining the identity of the beneficiaries under the will or the nature or quality of the benefit to them. The event referred to can exist or take place before or after execution of the will or before or after death of the testator. Nebraska did not previously have statutory or decisional law involving this area, but there was one decision that touched on the issue. However, the issue was ultimately framed as one of the use of parole evidence to determine the meaning of the terms of the will. Now there is a specific rule, section 30-2337, which states that events of independent significance can be referred to in the will. The key to independently significant events is that they must exist and have significance apart from how they determine the disposition of property under the will.

The final area of "externality" recognized by the Code is "a laundry list," which is simply something of dependent significance because it in and of itself determines some of the dispositions made by the will. Section 30-2338 of the Code covers this area. This is another area where the Troyer Committee recommended a revision from the Uniform Probate Code. The revision required that the initial laundry list bear an indication of the date of signing. First of all, a laundry list cannot be used unless it is specifically referred to in a will. It is unlikely that there would be such a reference in a holographic will, although it is possible. More likely, the list would be referred to in the standard will drawn by an attorney. The attorney has the duty of advising the client how to prepare the laundry list, and he should include in the advice that the list should be dated. After the list is made, the testator can cross items out or amend the list as many times as he wishes. There are a few limitations on the nature of the property that can be disposed of by the use of a laundry list. Generally, commercial paper is excluded, as well as property used in the business or trade of the testator. But practically anything else involving tangible personalty can be devised by reference to the laundry list. As far as can be determined, a laundry list was not permitted under prior law.

RULES OF CONSTRUCTION

The Code codifies and collects many rules of will construction which were previously recognized in Nebraska and elsewhere. The

important rule to remember, however, is that the intention of the testator prevails as expressed in the will. Specific problems of construction are almost always easily dealt with by proper draftsmanship because a rule of construction provided by the Code only becomes applicable in the absence of a differing construction provided by the terms of the will itself. The particular rules should be studied closely as a valuable aid to will drafting. They are to be found in sections 30-2339 to 30-2350 in the Nebraska Probate Code.