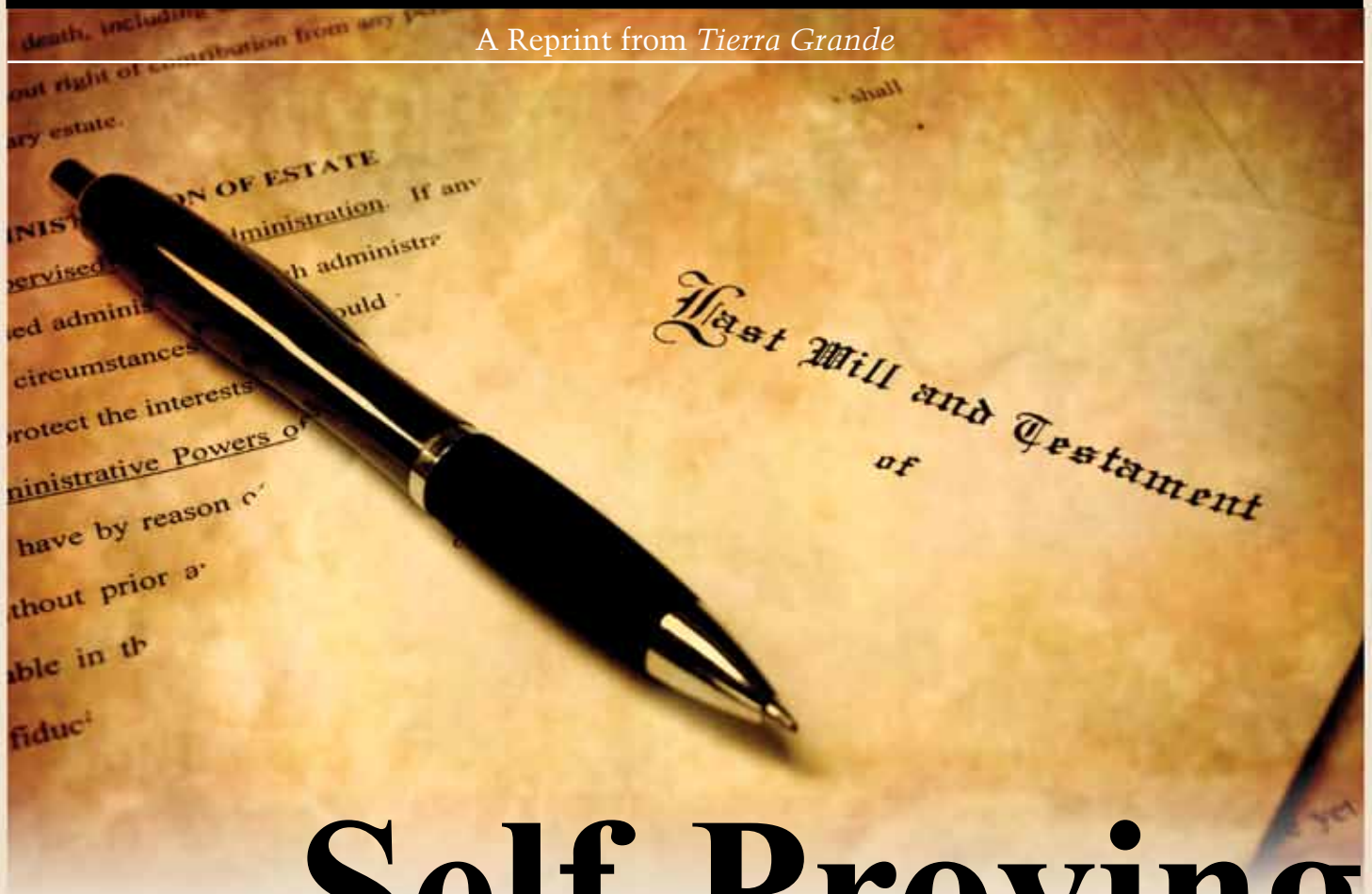


A Reprint from *Tierra Grande*



Self-Proving Wills

By Judon Fambrough

H

Historically, Texas recognized three types of wills. The first was an oral will, sometimes called a *nuncupative will* or *deathbed wish*. Because of their limited application, oral wills made (signed) after Sept. 1, 2007, are no longer valid in Texas.

The two other types are still valid. A will written entirely in the deceased's handwriting is known as a *holographic will*. A will not entirely in the deceased's handwriting (typically a typewritten will) is known as an *attested will*.

Figure 1. Self-Proving Affidavit for Holographic Will

THE STATE OF TEXAS
 COUNTY OF _____
 (County where signed)

Before me, the undersigned authority, on this day personally appeared _____, known to me to be the testator (testatrix), whose name is subscribed to the foregoing will, who first being by me duly sworn, declared to me that the said foregoing instrument is his (her) last will and testament, that he (she) had willingly made and executed it as his (her) free act and deed, that he (she) was at the time of execution eighteen years of age or over (or being under such age, was or had been lawfully married, or was a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service), that he (she) was of sound mind at the time of execution and that he (she) has not revoked the will and testament.

 Testator (Testatrix)

Subscribed and acknowledged before me by the said _____, testator (testatrix), this _____ day of _____ A.D. _____.

(Seal) (Signed) _____
 (Official Capacity of Officer)

Self-Proving Holographic Wills

Holographic wills need no witnesses to be valid. The law simply requires that the document be entirely in the deceased’s handwriting and signed. No date is required, but one should be included.

A holographic will may be made self-proving either at the time it is signed or any time thereafter before the maker (testator, if a man, or a testatrix, if a woman) dies. To do so, the maker must swear to and sign an affidavit before a notary stating the instrument is the maker’s last will and testament, and that the maker:

- was at least 18 years old when the will was executed (or, if younger than 18, the maker was lawfully married at the time or a member of the U.S. Armed Forces, an auxiliary thereof or the Maritime Service),
- was of sound mind and
- had not revoked the will.

An officer authorized to administer oaths, which includes notaries and military officers among others, must then place his or her seal and signature on the affidavit (Figure 1 shows an example). The affidavit must then be attached to the will.

One person can draft (write) and sign a valid holographic will. However, it takes two to make it self-proving: the testator (or testatrix) and a notary. The statute does not contain a recommended form for holographic wills, only the required contents of the self-proving affidavit.

Before either can be admitted into probate, it must be proven as the deceased’s last will and testament. For holographic wills, the proof comes from the sworn testimony or an affidavit of two people familiar with the deceased’s handwriting. For attested wills, the proof springs from the testimony or an affidavit from at least two of the people who served as witnesses to the will.

This procedure creates problems, especially when a witness predeceases the maker or can no longer be located. There is, however, an alternative that avoids these problems. It is known as a *self-proving will*. Self-proving wills can be admitted into probate without the need for sworn testimonies or affidavits.

Contrary to what the name implies, self-proving wills are not a separate and distinct type of will. Instead, they are either a holographic or attested will that needs no independent proof before being admitted into probate. The statutory requirements for making a will self-proving are outlined in Section 59 of the Texas Probate Code (TPC) for attested wills and Section 60 for holographic wills. After Sept. 1, 2014, the two sections merge into the newly enacted Texas Estate Code.

Self-proving wills have the obvious advantage of being easier, quicker and less expensive to prove. But, as with other wills, they can still be contested, revoked or amended.

Figure 2. Promulgated Form for Attested Wills

THE STATE OF TEXAS
COUNTY OF _____
(County where signed)

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said _____, testator, declared to me and to the said witnesses in my presence that said instrument is [his/her] last will and testament, and that [he/she] had willingly made and executed it as [his/her] free act and deed; and the said witnesses, each on [his/her] oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is [his/her] last will and testament, and that [he/she] executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at [his/her] request; that [he/she] was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States, or an auxiliary of the armed forces of the United States, or the United States Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

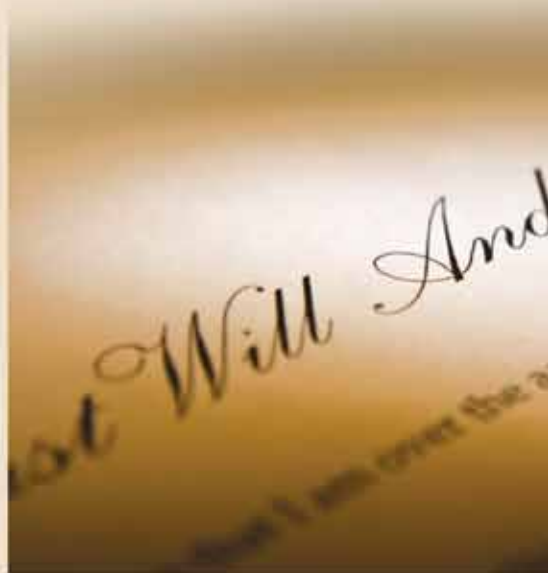
Testator

Witness

Witness

Subscribed and sworn to before me by the said _____, testator, and by the said _____ and _____, witnesses, this ____ day of _____ A.D. _____.

(Seal) (Signed) _____
(Official Capacity of Officer)



two of them) must sign the promulgated statutory affidavit (Figure 2) after taking an oath before a notary authorized to administer such oaths. The maker and the witnesses must sign the affidavit in each other's presence and in the presence of the notary. The notary then places his or her seal and signature on the document, and the affidavit is then attached to the will.

The statute makes no distinction in the sex of the maker. In fact, the Probate Code states that *the masculine gender includes the feminine and neuter* in its definitions. Consequently, the term "testator" as used in the promulgated form refers to either sex.

New Procedure

The 82nd Texas Legislature added a new way to make attested wills self-proving after Sept. 1, 2011 (Figure 3). The new procedure requires the maker and the witnesses to sign only once. The prescribed statutory language of the self-proving affidavit is incorporated into the text at the end of the will, so no separate affidavit needs to be signed and attached.

Under the new procedure, the maker must sign in the presence of the witnesses and notary, the witnesses must sign in each other's presence and in the presence of the maker and notary, and the notary must sign and affix his or her seal in the presence of the maker and the witnesses.

The new procedure changes the process in another way. Before, the attested will could be made self-proving at the time it is signed or anytime thereafter before the maker dies. Now, the attested

Self-Proving Attested Wills

A valid attested will requires the maker's signature and the signature of two or more credible witnesses. A credible witness is a competent person older than 19 who is not a beneficiary of the will.

The maker need not sign the will in the presence of the witnesses, but he

or she must sign prior to the witnesses signing. The witnesses must sign the will in the presence of the maker but not in the presence of each other.

An attested will, as with a holographic will, may be made self-proving at the time it is signed, or anytime thereafter before the maker dies. To do so, the maker and all the witnesses (at least

**Figure 3. Alternative for Self-Proving Attested Wills
After Sept. 1, 2011**



will must be made self-proving at the time it is signed.

That is not to say that the former option no longer exists. It does. However, the old option does not have the language of the self-proving affidavit incorporated into the text.

The new statute applies only to attested wills. It does not affect the method by which holographic wills are made self-proving.

Wills with Codicils

While the statutes outline the procedures for making wills self-proving, caution should be taken when amending or modifying a will with a codicil. The execution of a codicil, to be effective, must go through the same procedure of signing and being made self-proving as the original will. Otherwise, it may not be admitted to probate, or may not be admitted into probate without additional proof, depending on the circumstances.

Foreign Self-Proving Wills

Prior to Sept. 1, 2011, wills executed in other states or foreign countries could not be recognized as self-proving in Texas. The 82nd Texas Legislature amended the statutes to recognize the validity of such wills. Now, a will executed in another state or a foreign country is considered self-proving if done (1) in conformity with Section 59 for attested wills or (2) in accordance with the laws of the state or foreign country of the testator's domicile at the time of the execution. The statute goes on to state that no matter the laws of the

I, _____, as testator, after being duly sworn, declare to the undersigned witnesses and to the undersigned authority that this instrument is my will, that I have willingly made and executed it in the presence of the undersigned witnesses, all of whom were present at the same time, as my free act and deed, and that I have requested each of the undersigned witnesses to sign this will in my presence and in the presence of each other. I now sign this will in the presence of the attesting witnesses and the undersigned authority on this _____ day of _____, 20____.

Testator

The undersigned, _____ and _____, each being above fourteen years of age, after being duly sworn, declare to the testator and to the undersigned authority that the testator declared to us that this instrument is the testator's will and that the testator requested us to act as witnesses to the testator's will and signature. The testator then signed this will in our presence, all of us being present at the same time. The testator is eighteen years of age or over (or being under such age, is or has been lawfully married, or is a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service), and we believe the testator to be of sound mind. We now sign our names as attesting witnesses in the presence of the testator, each other, and the undersigned authority on this _____ day of _____, 20____.

Witness

Witness

Subscribed and sworn to before me by the said _____, testator, and by the said _____ and _____, witnesses, this _____ day of _____ A.D. _____.

(Seal)

(Signed) _____

(Official Capacity of Officer)

other state or foreign country, the will is considered self-proving if it meets the requirements set forth in Section 59.

This article is for information only. For specific legal advice, consult an attorney. ➔

Fambrough (judon@tamu.edu) is a member of the State Bar of Texas and a lawyer with the Real Estate Center at Texas A&M University.

THE TAKEAWAY

Texas residents have the unique opportunity to streamline the probate process by making their wills self-proving. A self-proving will avoids the necessity of having third-party verification.



MAYS BUSINESS SCHOOL

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

<http://recenter.tamu.edu>
979-845-2031

Director, Gary W. Maler; **Chief Economist**, Dr. Mark G. Dotzour; **Communications Director**, David S. Jones; **Managing Editor**, Nancy McQuiston; **Associate Editor**, Bryan Pope; **Assistant Editor**, Kammy Baumann; **Art Director**, Robert P. Beals II; **Graphic Designer**, JP Beato III; **Circulation Manager**, Mark Baumann; **Typography**, Real Estate Center.

Advisory Committee

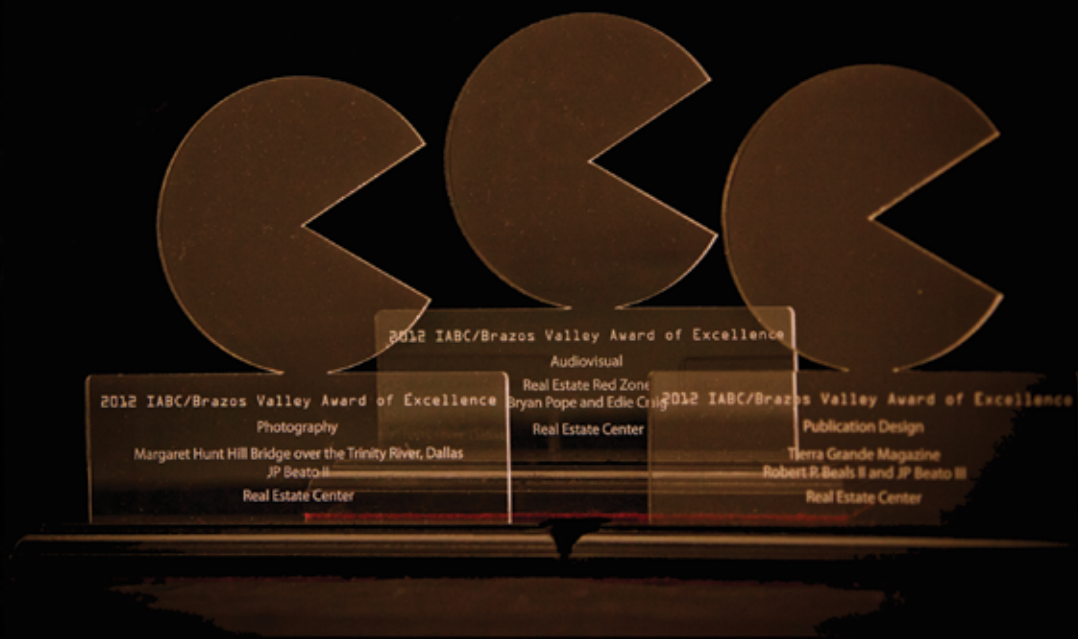
Joe Bob McCart, Amarillo, chairman; , Mario A. Arriaga, Spring, vice chairman; James Michael Boyd, Houston; Russell Cain, Fort Lavaca; Jacquelyn K. Hawkins, Austin; Kathleen McKenzie Owen, Pipe Creek; Kimberly Shambley, Dallas; Ronald C. Wakefield, San Antonio; and Avis Wukasch, Georgetown, ex-officio representing the Texas Real Estate Commission.

Tierra Grande (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, \$20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: Real Estate Center files, pp. 1, 3, 4.



We're Going to Need a Bigger Trophy Case

During the last 40 years, the Real Estate Center staff has won more than 200 awards for its communications expertise. The winning legacy continues.



AWARDS OF EXCELLENCE 2012 BRAZOS BRAVO COMPETITION*

Photography : *Tierra Grande* October cover : JP Beato III

Magazine Design : *Tierra Grande* : Robert P. Beals II, JP Beato III, Kammy Baumann

Audiovisuals : Real Estate Red Zone Podcast : Bryan Pope, Edie Craig



26th Annual Legal Seminar on

AD Valorem Taxation



August 29–31, 2012

Hyatt Regency San Antonio Riverwalk
San Antonio, Texas

The 26th Annual Legal Seminar on Ad Valorem Taxation provides a wealth of information on a variety of legal, economic and other relevant issues.

Benefits of Attending

- learn about the latest legal issues in ad valorem taxation
- understand current economic trends
- gain insight into how public policies are developed
- examine appraisal practices

Who Should Attend

- real estate licensees
- appraisers
- policy makers
- lenders
- attorneys
- investors
- land buyers
- land sellers
- consultants

Register Online www.recenter.tamu.edu/register



Sponsored by the State Bar of Texas Property Tax Committee and the Real Estate Center at Texas A&M University