15 Mistakes & Simple Suggestions for a Future Smooth Probate

1. **Ensure your Testator destroys his or her old Will once you have executed a new one.**
2. **Name and identify all distributees and legatees in the Will, and include their addresses.**
3. **If you come across a mistake in a Will you have already executed, re-execute the document with the client.**
4. **Keep Wills concise and to the point.**
5. **Discuss the financial impact of small bequests with the client, and propose alternative means to benefit these beneficiaries.**
6. **Suggest the use of an inter vivos trust when there are several lost or foreign distributees and legatees involved with the estate.**
7. **Keep the number of named executors to a reasonable number. If you do not want a party to serve as executor, make sure to say so in the Will.**
8. **Include an UTMA clause in the Will. Where large sums are being left to a minor, create a testamentary trust in the Will.**
9. **Include a Supplemental Needs Trust provision in the Will.**
10. **Provide an absolute ending point of contingent beneficiaries under the Will that is both realistic and practical.**
11. **Discuss what bonding is with your client; know when it is not appropriate to waive bond.**
12. **Make sure to include plain-English reasons why a future guardian for minor children may be an unsuitable candidate.**
13. **Make sure your client's beneficiaries and the estate's obligations can afford to wait out the period of Survivorship in the Will.**
14. **Not providing adequate funds for post-mortem expenses.**
15. **Make sure you execute all documents properly as required by law.**

<u>BONUS</u>

16. **Make sure witnesses to the Will can be easily identifiable and found in the future, and have them sign the Self-Proving Affidavit at execution.**
17. **Have a policy as to which client Wills to hold in your possession; any client who would realistically outlive your practice is often not a suitable candidate's Will to keep in your possession.**

What follows are problems (and simple solutions) that an attorney may face if he or she is familiar with drafting Wills, but has not yet experienced many of the nuances associated with Probate.

1. Not destroying or revoking past Wills

The first sentence of almost every Will you ever read shall cancel all past-executed Wills the Testator has ever drafted. Indeed, it is hard to imagine any attorney not revoking any and all past Wills and codicils in the first paragraph of a new Will. It is more reasonable, however, to assume that an attorney is holding onto an old original Will that has since been revoked and must now be delivered to the court upon learning the Testator has passed away. This can cause a great deal of delays and possible problems for the attorney administering to the Probate of the new Will.

This problem tends to happen in one of three ways:

(1) A decedent is in possession of more than one original (differing) Will(s) executed at different times
(2) A Testator deposits a Will at her domicile county's courthouse for safekeeping prior to her passing; when the practitioner delivers a Probate petition with a more recent Will the court finds the older Will in its possession;
(3) An opposing party in a Will dispute "miraculously" finds an older Will executed by the Testator at a crucial time in the Will dispute process.

<u>When Multiple Original Wills Are Found</u>

When two differing original Wills are found and submitted to the Court the existence and parties in both Wills must be included on the Probate petition: While an old Will may eventually be revoked upon a newer Will being admitted to the Court, there is still the issue of actually having that newer Will admitted. Prior to that time, the petition and waivers must include the adversely-affected parties listed in the old Will. At best, this requires more parties to be placed on notice; at worst, it may lead to a Will dispute initiated by the adversely affected parties who receive less than they did under the old Will.

<u>Past Attorney as Bailee</u>

In addition, remember that many attorneys act as Bailees of Wills, meaning they hold onto the original executed Wills they have created for their clients. If you are meeting with a client for the first time who has already had his or her Will drafted in the past, it is very possible they are not even in possession of their existing original Will. Part of your process should be to have them get possession of that old Will from their prior attorney, and have that Will destroyed the moment you execute the new Will.

➔ **Ensure your Testator destroys his or her old Will once you have executed a new one.**

2. Not naming or including a Family Tree in the Will

Remember that the cornerstone of Probate is, almost paradoxically, the laws of Intestacy (dying without a Will). The concept of someone's descendants and heirs is often best referred to as his or her "Next of Kin" when working with the public, as people seem to understand this means their closest family members. Any party that would have to be put on notice during an Administration proceeding must also be put on notice during the Probate of the same decedent if a Will did exist.

Explaining Procuring Jurisdiction Over Necessary Parties

The very concept of the requirement of placing the next of kin on notice is foreign to most clients: Why does a person's nearest relative, who the Testator may loath, have to be placed on notice of the Probate of the Will, even if they are being disinherited? This must be explained to a client instead of glossing-over the topic, as there could be substantial assets expended to accomplish notice requirements, since additional problems arise when the closest family members cannot be identified or found.

Unfamiliarly Family Members – Close and Distant

Many members of small families may not be in close contact with their nearest heirs, and may not have ever met them. This tends to happen more often with foreign-born clients (see more below) and people who have moved far away from the rest of their families, but lost heirs are not an exclusive issue to these parties. Using genealogists and private investigators in these circumstances may prove to be very expensive but otherwise necessary; it is often better to have the Testator's assets pass by operation of law using trusts, transfer on death accounts and life estates or joint accounts, thereby avoiding the need to identify these heirs (not to mention subsequently serving them), is a proper practice.

A more frequent and avoidable issue is when addresses of the nearest heirs are not known, or when a family member within the line of succession has predeceased the Testator. For Example: If a Testator has never been married, outlived his or her parents, has no children, and has two siblings who have children of their own, it is a good idea to state this in the Will, and to say where they are living at that time:

Example:

> *I have never been married and have no children alive or deceased, naturally or adopted. My Father, Bart Starr, predeceased me in 1997, and my mother, Martha Starr, predeceased me in 2001. I am survived by my two siblings: Joseph Starr, with a current residence located at 123 Barker Street, Green Bay, WI, and Jennifer Favre, who lived somewhere in Murrayville, TX when I last spoke to her in 2006. I have no other siblings alive or deceased. Joseph has two children, Lesley Starr and Miley Starr. Jennifer has one child, Mickey Farve.*

Placing this type of information in a Will benefits the Testator, the estate and the future Probating attorney in the following ways:

(1) Finding these heirs becomes much easier when the Testator passes away.
(2) The court clerks can better identify the next of kin when comparing the Will to an heirship affidavit.
(3) Ensuring the Petition has all relevant information regarding distributes.
(4) Establishing proof of the Testator's knowledge of the "fruits of his bounty" (I.e. closest family members otherwise entitled to his estate under Intestacy)

➔ **Name and identify all distributees and legatees in the Will, and include their addresses, if known, in the Will**

3. Not having an identified mistake fixed after a Will has already been executed

Very few (no?) Wills are entirely original content: Most clients tend to fit into a few categories that the estate practitioner has already encountered, and the attorney often uses an existing client's documents as a template for creating documents for the new client. The downside is that some information from the old client's document may sneak its way into the new client's Will: Incorrect names, wrong birthdays or family members, and incorrect fiduciary provisions are more frequently an issue in these cases than incorrect distributive instructions (if the drafting attorney is lucky).

When a Will is submitted for Probate and the error is found the drafting attorney must create a "Scrivener's Error Affidavit" explaining what was meant to be represented in the documents. Alternatively, the court can make a ruling as to what was meant to take place (though may not be willing to do so where the error creates a significant amount of ambiguity to affect a legatee or distributee under the Will). Neither circumstance is preferable.

Of course, these aforementioned corrective measures assume that the error is merely cosmetic and does not affect who is receiving estate assets, in which case a formal dispute (and possibly the attorney's malpractice insurance carrier) will have to get involved. When you spot a Will with an error, whether it is glaringly obvious or merely leaves open a measure of uncertainty, and hoping the issue will go away is not a position you want to be in.

➔ **If you come across a mistake in a Will you have already executed, contact the client and offer to re-execute the document at your expense.**

4. Making the Will too long

Most Wills are far larger and longer than they need to be. Several Wills may only have a few pages of individualized content, and then tens of pages of "universal" (a/k/a boilerplate) content placed in each practitioner's Wills, such as fiduciary powers and provisions. This leads to two major problems:

Overwhelming the Client

First, your initial line of defense against inconsistencies is your client. Yes, the client does not understand many of the legal terms in the Will, but they do know what they don't understand and what is abjectly wrong. By loading a client with perhaps 8 pages of individualized content and 12 pages of boilerplate material you have distracting your best source from informing you of where errors are taking place.

Assume Clerks Catch Every Error

Second, Wills are reviewed in their entirety by at least one clerk of the court upon submission to Probate. If you can imagine yourself feeling drained when you have to read one canned document during your week, imagine reading ten of them every day. More importantly, a clerk often finds any mistake or inconsistency between your individualized content for this client's Will and your standard universal content included afterward. These circumstances may warrant a bench ruling or a Will construction proceeding.

Every state has numerous default provisions relating to estates that more often than not make sense when a certain procedural aspect is not addressed in your Will. Practitioners tend to underemphasize the importance of the advice they provide during consultations, and overestimate the importance of their final deliverable product. Shorter Wills decrease the chances for inconsistencies and corrective proceedings, and make it easier for your client to understand the document.

➔ **Keep Wills concise and to the point.**

5. Making small general bequests

Some Testators want to leave nominal gifts to multiple individuals. These token bequests may serve as a final expression of appreciation to the recipient. But leaving small bequests tend to cost as much in legal fees as the actual bequest does.

Example:

> *Bertha (the Testator) bequeaths $1,000 to her college friend Stephen. The presiding estate attorney must (a) find Stephen's whereabouts, (b) send Stephen Notice of Probate, (c) create a Release for Stephen's bequest, and (4) ensure return receipt of the Release. While none of these tasks are necessarily difficult, they can be time consuming; total legal fees for this one bequest equal $1,200.*

Survivorship Issues Become Relevant, and More of a Hassle

In addition, if a Testator insists on leaving small bequests to beneficiaries, they will most likely want to include some survivorship clause, stating that the beneficiary is required to survive the testator in order to collect their bequest. Remember that bequests do not "lapse" into the residuary for certain people: In many states, any family member that is a sibling or closer has his or her bequest pass to his children if he predeceases the Testator. This, again, leads to additional

legal fees and notice requirements; confirming that a beneficiary receiving a small bequest (or any bequest for that matter) is the only one the Testator wishes to receive the bequest should allow you to insert of a survivorship clause into the Will.

Consider Using Operation of Law Transfers for Small Bequests

Small bequests are more easily accomplished utilizing Transfer on Death ["TOD"] or In Trust For {"ITF"] accounts: The Testator can choose how much money to keep in these accounts, may have multiple beneficiaries, may revoke the accounts by simply withdrawing all money, and does not even have to inform the eventual recipient of the account until the owner's passing.

In addition, the burden of transferring the funds now falls on the account beneficiaries instead of the Executor, and the onus of transferring the funds is no longer placed on the attorney: The financial institution may ask the next of kin or Executor for the recipient's contact information, at which point only the beneficiary(ies) of the account is required.

➔ **Discuss the financial impact of small bequests with the client, and propose alternative means to benefit these beneficiaries**

6. Leaving money to hard-to-identify parties or foreign individuals

Make sure you know your state's notice requirements for Probate!

The problems of leaving money to difficult-to-find parties cannot be overstated. If the party is a distributee you find yourself in a bad situation: Unlike personal jurisdiction requirements under many other proceedings, a Probate Citation cannot be left to a suitable party, such as a building's doorman, or "nailed and mailed" without the Court's permission in many states.

In some states, a Legatee (I.e. a beneficiary to the Will who is not a Distributee) who is placed on notice requires the mailing individual sign an affidavit (or, if it is the attorney, an attorney affirmation) that notice of Probate was sent return receipt and the mail has not been returned. If a Distributee or Legatee is a foreign citizen you may have to place his or her consulate on notice that one of their citizens is receiving funds from an estate.

Difficulties Specifically Faced by People Out of the Country

Suppose your Testator has several foreign distributees, or left property in her Will to many people not currently living in the United States. If it is the former, they shall require waivers to be notarized (or citations to be delivered to them); any beneficiary shall need to sign a Release that is notarized as well. If the parties cannot make it to a US embassy or consulate to get these documents notarized, they need to get an "Apostille" which serves as a sort of international notarization under the 1961 Hague Convention.

Unfound Necessary Parties, by Default, Often Have Counsel Appointed

Distributees who cannot be found (and minors) will have a Guardian Ad Litem appointed to represent their interests. This will add both time and expense, as the Guardian must report to the

Court after interviewing certain individuals and performing his own due diligence. Before you can even get to that point, the Surrogate's Court will require you to prove you made diligent efforts to find the missing party, which also adds time and expense.

The Attorney Must Explain the Differences of Probate Assets and Testamentary Substitutes

Remember that it is vital a client understand what passes through the Courts and Probate, and what passes by Operation of Law. Most clients have no idea of what Probate is, and how it may be avoided. Remind a client that Testamentary Substitutes (joint property, accounts with beneficiary designations, trust assets, Transfer On Death and In Trust For accounts) have a party we can identify the moment the originally owner passes, whereas Testamentary Assets held by the decedent's Probate estate are awaiting the Court's acquiescence to distribute under the document purported to be the Will.

Unfortunately, there is no one-fits-all approach for clients leaving money to many family members or those living outside of the United States. An inter vivos trust is usually the best approach, as it minimizes formal notice requirements associated with Wills, and allows the fiduciary more control over the transfer than a TOD or ITF account.

➔ **Suggest the use of an inter vivos trust when there are several lost or foreign distributees and legatees involved with the estate.**

7. Naming too many successor Executors

In a few states, all named executors in a Will must be placed on notice. This section only applies to those states.

If the successor executors' addresses are not listed in the Will, finding them creates the same issues discussed above regarding finding a Testator's legatees and distributees. The additional problem here, though, is that a distributee is required to receive a Waiver or Citation whether or not there is a Will; absent being named as an executor in a Will, the person named as an executor would not have to be placed on notice but for the fact they were named in the Will.

While naming successor executors is good practice, it remains important to (a) include their contact information in the Will, (b) name at least one individual who is likely to far-outlive the Testator (if one is available), and (c) attempt to limit the number of named successors so as to minimize notice requirements.

If your named executors cannot serve in their role, the next party in line under Intestacy has the right to petition to act as executor. If this outcome is also not desired, make sure to say such a person should not serve.

➔ **Keep the number of named executors to a reasonable number. If you do not want a party to serve as executor, make sure to say so in the Will.**

8. **Neglecting to prepare for underage beneficiaries**

Minors Cannot Receive Funds

It is absolutely crucial to advise clients that naming a minor as a beneficiary can cost a lot of money in legal fees and hassles, since minors cannot receive money outright. Forgetting to create a testamentary trust for underage beneficiaries can be a costly mistake. First, any bequest made directly to a minor allows the Court to hire a Conservator (in some states known as a Guardian Ad Litem) to represent the beneficiary, particularly if the minor is receiving substantial funds The Conservator submits a bill to the court for his services, and the court determines what it believes is a reasonable fee. This is only the first half of the problem: Upon attaining the age of majority the beneficiary may be legally entitled to all the funds that were bequeathed to him and "buy the fraternity" or spend all funds in some frivolous manner.

Include an UTMA Provision in the Will

Where nominal funds are involved the Will may include provisions allowing for the executor to deposit such funds in a Uniform Transfer to Minors Act ["UTMA"] account. An adult custodian is named on the account who invests the funds as they deem fit as a fiduciary. When the minor attains age 21 he or she may withdraw the funds. This should allow the executor to avoid having a court appointed attorney named, thereby saving estate funds.

Create Testamentary Trusts in Wills for Larger Bequests

Of course, an UTMA does not protect a beneficiary from himself: He still receives the funds at a young age. Instead, the Testator may include a simple trust in the Will, often referred to as a "testamentary trust." This differs from inter-vivos trusts in that the latter are created during life, while testamentary trusts are only created upon the Will being admitted to Probate. The court grants Letters of Trusteeship so that the named trustee can open accounts for the beneficiary(ies).

Trusts allow a Testator to set a wide range of controlled distributions and investment options. A trustee may have the ability to pay for a beneficiary's healthcare, education or real estate purchases. Trust funds may be distributed at multiple periods or at the trustee's discretion, and may allow for cessation of payments in the instance of drug addiction, divorce, creditor issues or other problems of the beneficiary's making. And because there is written direction for the use of the money, a GAL is typically not required.

Getting the Beneficiary Designation Form Right

Of additional importance is properly titling beneficiary designations for testamentary substitutes that you wish to transfer to testamentary trusts. An error at this point could seriously hurt the client's estate plan, so it is crucial to get the actual name of the Trust correct.

When you have a beneficiary designation form for a life insurance or retirement plan which you wish to lease to a testamentary trust, you should title them as follows:

> *"To the Trustee of the Trust Created for my Children under Article VII of my Will dated March 17, 2016"*

In other words, break down the designation into its individual components:

(1) To Whom → The Trustee
(2) For Whom → The Trust created for a certain party
(3) Found Where → in a specific article of the Will from a certain date

Do NOT name "My Estate" or "My Probate Estate" as the Beneficiary of Retirement Plans or Life Insurance Policies

An entire CLE could be written on this topic alone: There are consequences of not having the Trust be a "see through trust" for retirement plan required minimum distributions being stretched and leading to a 5-year payout schedule, for life insurance now becoming a Probate asset that creditors can collect, etc. Keep it simple: Do NOT name the Testator's estate as the beneficiary, and try to follow the steps listed above.

In Summation:

Make sure your choice of UTMA Custodian or Trustee is appropriate: Will the person fulfill his or her job, or abscond with the funds? Will the fiduciary invest the funds appropriately? Is the fiduciary the correct age, meaning that they will be around and mentally competent when the property passes to the beneficiary?

➔ **Include an UTMA clause in the Will. Where large sums are being left to a minor, create a testamentary trust in the Will.**

9. Neglecting to prepare for disabled beneficiaries

This is, perhaps, the most expensive omission in any Will: not preparing for the proper distribution of funds to legally disabled beneficiaries. Also known as Supplemental Needs Trusts and Special Needs Trusts, these provisions allow a beneficiary receiving Medicaid or Supplemental Security Income to continue receiving their benefits while simultaneously having funds available to them in trust.

By way of illustration: Medicaid pays for a disabled individual's health care needs and assistance for activities of daily living. It is a "needs based" program, meaning that a Medicaid recipient cannot have more than modest assets and minimal monthly income. If a Testator leaves this type of beneficiary too much money outright (instead of leaving the executor the ability to create a testamentary supplemental needs trust) one thing will happen and another can happen:

(1) WILL HAPPEN: The beneficiary shall be over his or her allowing resource level and be removed from Medicaid

(2) MIGHT HAPPEN: If the beneficiary has a substantial expenses paid for by Medicaid, the bequest will have a Medicaid lien places against it

All too often, almost always unintentionally, bequests in Wills either get a beneficiary removed from receiving Medicaid benefits, or require additional attorney fees in the form of an attorney

petitioning the courts to have the bequest used to fund a court-ordered SNT. This can be avoided by merely inserting a simple provision into a simple Will.

Remember that Medicaid benefits, limitations, and exemptions vary greatly from state to state. This is, at a minimum, a crucial area for estate practitioners to have a modest understanding of, and finding a fellow attorney well-versed in Medicaid is critical to your clients' financial wellbeing.

➔ **Include a Supplemental Needs Trust provision in the Will.**

10. Not considering the appropriate number of contingent beneficiaries to plan for

It is vital that a Will have a starting point and realistic ending point as to who receives what property. Is there a contingent owner named if the initial beneficiaries predecease? Are funds left per stirpes or by representation (and do you remember the difference)? And what about funds left in a testamentary trust? Is there an ending age or date of the trust?

There should be a starting point and absolute ending point for all bequests in estate documents. But the exercise of "If this person predeceases you, then what? And if that person also predeceases you, then what? And then if that person does too, then what?" can become strictly academic or, at worst, acrimonious if a couple loses focus on more-immediate beneficiaries by arguing over unlikely contingencies.

What is a reasonable cut-off point for preparing contingencies?

I suggest the attorney offer hypothetical contingencies that are reasonable:

- What is somewhat likely to occur in the next 25 years?
- Will you be able to change your documents if key players to your estate have all died in rapid succession?
- Is it possible to name entire sides of a family instead of individual family members (Example: "*My cousins and my wife's cousins per stirpes*," NOT "*My cousins Harry and Nancy, but not Tina and her cousin Bill but, but yes to Jacqui if she is 30 and a college graduate…")?*

By answering these three questions you should be able to create a solid legal document that avoids future litigation but does not read like a "Choose Your Own Adventure" book.

➔ **Provide an absolute ending point of contingent beneficiaries under the Will that is both realistic and practical.**

11. Automatically waiving Trustee and Executor bonding without explaining it purpose

Much like revoking all past Wills and codicils, it is very rare to see a Will that does not waive bond for any serving fiduciary. This knee-jerk response, while both commonplace and understandable, should first be explained prior to automatically inserting it into a Will.

A bond is insurance on the fiduciary: If an executor, administrator or trustee is bonded and then absconds with estate funds the bonding company will pay the beneficiaries' bequests themselves, and then pursue the fiduciary for the absconded funds. Because the beneficiaries' payments are ensured, courts tend to favor estate bonding, and may often require it during administration proceedings where several parties are beneficiaries.

Understand What is Required for Bonding

To be fair, while bonding does protect beneficiaries from an absconding fiduciary, procuring bonding is not always an easy process: A proposed fiduciary must have a credit check, a lien search, a criminal background search, must report his income and assets annually, and must pay for the initial premiums himself (though he can be reimbursed upon the bond being filed with the court). Any one of these requirements can be viewed as intrusive, and when a fiduciary has a weakness on any of these prerequisites the most favorable bonding companies may reject the request; indeed, in some circumstances it is hard to find any bonding company that will insure certain fiduciaries. The problem is that if a bond cannot be procured then full Letters Will not be issued.

Be mindful to waive bond for trusted fiduciaries, such as a spouse or responsible children. For more-remote family members, work with the client to determine whether requiring bond will disincentivize their acting a fiduciary.

➔ **Discuss what bonding is with your client; know when it is not appropriate to waive bond.**

12. Not warning the court as to improper Guardians of minor children

Parents of minor children will often request an attorney draft their Wills for the primary purpose of naming a guardian for their children if they pass away unexpectedly. While it is the court's mandate to ask "what is in the best interest of the child," it is helpful to provide the court with information it may not immediately become aware of regarding certain choices of guardian.

Courts don't always communicate to each other effectively

A child's other parent or grandparent may have criminal proceedings against them in another jurisdiction, or may be woefully behind on child support payments. Certain parties may be physically abusive or may have substance abuse issues. The court may not immediately know this without you providing such information in the Will.

Statements such as: "*My children's father is two years behind on child support payments",* or "*My children's mother has been sent to rehab for alcohol abuse on four separate occasions*" puts the court on notice that a detailed investigation may be required before guardianship is granted.

Lastly, as a significant side note, a guardian may have to post a bond just like an executor does (since they are in control of day-to-day matters of the child), so discuss waiving bond for the guardian before assuming the parent wants it waived.

➔ **Make sure to include plain-English reasons why a future guardian for minor children may be an unsuitable candidate.**

13. Adding exceedingly long survivorship provisions in the Will

Survivorship clauses allow Testators to ensure that testamentary assets pass to certain beneficiaries and not those beneficiaries' estates or survivors: Your client may want to have a bequest given to his siblings, but he may not be close to those siblings' children.

Survivorship clauses also allow resolution of certain issues surrounding simultaneous deaths of spouses and domestic partners (though a simultaneous death provision may be more appropriate). However, just like waiving bond, a survivorship clause is more often a knee-jerk addition to a Will rather than a necessary aspect of the Testator's past desires, and may be contrary to the decedent's desire to expedite his or her estate's affairs.

<u>Survivorship Clauses Delay the Will's Admittance for Probate</u>

The entire idea of these clauses is to ensure the right beneficiary receives the bequest left to them in the Will: If the Will states that survivors must outlive the Testator by 90 days, then the estate has to wait at least 90 days after the Testator's death before the Will can be submitted to the court (since we don't know who the entire distributive pattern of the Will until that time, since certain beneficiaries may then be deceased themselves). So this causes two problems:

(1) The long survivorship clause now means that the Executor is denied access to estate assets for an additional period of time; bills may fall into arrears and assess penalties, someone may have to advance money for the estate for a prolonged period, etc.

(2) Needy beneficiaries are now required to wait an additional period of time before receiving their bequests

➔ **Make sure your client's beneficiaries and the estate's obligations can afford to wait out the period of Survivorship in the Will**

14. Not Providing Adequate Funds for Post-Mortem Expenses

Funerals cost money. Burials and cremations cost money. Wakes cost money. So do attorneys who need to be retained to commence Probate, as well as court filing fees, payment for proper service to procure jurisdiction of necessary parties, etc. The problem is that the funds attempting to be procured through Probate cannot be accessed until the process has commenced. These

expenses can be substantial, and many families may not have a financially-sound member who can advance necessary initial expenses.

Providing funds to a responsible person, such as your future Executor, by utilizing an In Trust For ["ITF"] or Transfer On Death ["TOD"] account should make these funds easily accessible to provide for these costs and commence estate proceedings, since the account's beneficiary only needs a Death Certificate to procure the proceeds of the account. Of course, if the person is not financially dependable this individual or strategy is not a good option. And while the responsible party will eventually be allowed to re-collect these funds as a creditor of the Probate estate (since title to the funds passed to him or her at the time of the Decedent's passing, thus effectively receiving these convenience funds as an additional bequest), it is better than having to struggle to find another party to pay for your final affairs.

➔ **Consider leaving a TOD account containing initial estate administration funds to a trusted person or your future Executor.**

15. Improper (Bad) execution

Having proper content within a Will is only half the battle; the other reason clients come to you instead of using online resources or blank Wills sold in stationary stores is to ensure their Wills are valid documents. This means the Will should be a validly-executed document.

<u>Typical Will Execution Requirements</u>

Remember that a valid Will must be

(1) signed by the Testator (or in the presence of the Testator by a representative)
(2) at the end of the Will
(3) and must be published by the testator
(4) The actual acknowledgement must be made
(5) in front of two (2) disinterested witnesses
(6) who must attest to the Testator's mental capacity and execution of the document

Anyone who is the next of kin often has the right to hold examinations of the Will's witnesses, so it is good to always follow the same execution habits. Some attorneys have lengthy scripts they read during execution, others read the self-proving affidavit to the witnesses; some attorneys will have their clients initial every page of the Will; the list can go on ad infinitum.

Here are some tips that should be generally followed to make execution ceremonies conform to execution requirements:

- Have the Will stapled PRIOR to the execution of the document, and do NOT unstaple the document.
- Have the Testator bring valid identification which you shall show to the witnesses.

- Look at your witnesses' identification at least once in your life: If you are the notary, you are notarizing their signature on the Self-Proving Affidavit, NOT the Testator's.
- Have the Testator (1) state his or her name, (2) sign in front of the witnesses (if possible) and (3) state the words *"I publish this to be my Will", "This is my Will",* or some other statement that demonstrate the Testator knows what he or she is signing.
- You may ask the Testator whether he or she knows the document is his or her Will, and who their nearest family members are.
- Have the witnesses NEATLY print their names (as well as sign their names), and include their current residential address or some other address they can be found at.
- Tell the witnesses to sign the Self-Proving Affidavit.
- Ask if anyone at the execution ceremony has any questions.
- **Make sure the Will is stapled!** A Will that is unstapled, has had staples removed at some point, or has been re-stapled shall require an Affidavit from parties stating they did not unstaple the Will, it was found unstapled, they did not insert any pages, etc. A mess!
- Make a photocopy of the document if possible.

➔ **Make sure you execute all documents properly as required by law.**

<u>BONUS</u>

16. Not being able to identify witnesses to the Will at the time of Probate

Witnessing a Will's execution (or the Testator "publishing" his or her signature to witnesses within a month's time) is an absolutely prerequisite to verifying a Will's validity: A Will without verifiable witnesses is not a Will.

Most Courts requires the names of the witnesses to the Will to be included in the Probate Petition. Of course, witnesses typically scribble their names in an illegible signature, and often do not include an address where they may be found. This may prove fatal to the Will if a witness has a common name and cannot be found when the Will it is contested by a disgruntled distributee, or when the witness does not remember the execution ceremony. Have the witnesses NEATLY print their names (as well as sign their names), and include their current residential address or some other address they can be found at in case of a future Will dispute.

It is also good practice to have a self-proving affidavit signed at the time of execution, or else the witnesses will have to sign it when the Will is delivered to the court with the Probate Petition for submission to the Surrogate's Court. This is not a good practice, as the witness may be hard to find, not remember the signing, etc.

➔ **Make sure that the witnesses to the Will can be easily identifiable and found in the future, and have them sign the Self-Proving Affidavit at execution**

BONUS

17. Holding onto all of your clients' Wills

Many attorneys have made it a habit to hold onto all of their clients' original Wills upon execution. Their stated purpose may have been that they didn't want the Will lost in case the client passed away and it couldn't be found, but it was more likely because the attorney wanted the first shot as acquiring the Testator's Probate work upon their passing. While this viewpoint may seem cynical, it has regularly played itself out.

An attorney may retire, switch firms, switch occupations or have property damage that causes his Will collection to be lost or ruined. If the attorney passes away his or her fiduciary must attempt to return the Wills to the client or the client's legal representative. This is no easy task: The Executor of your estate has most likely not met any of your clients, is not familiar with your systems (and will have trouble accessing any updated client contact information such as a change of address), and does not have any relationship with any of the client's family members.

A better practice is to only hold onto Wills for (1) clients who live far from their choice of Executor, (2) aging clients who do not have close family members as Executor, (3) Wills where there are uneven distributions to certain Legatees, or (4) where the attorney is the named Executor. Clients who are young, have trusting spouses and children named as Executors, or basically anyone who does not need their Will in your possession are not suitable bailors of Wills to you.

As an important side note, it is imperative that you place someone on notice of your firm's matters, such as naming a trusted colleague as a limited Attorney-in-Fact under a business power of attorney. You should inform them of the location of your attorney escrow account and a place where he or she can find current client funds on deposit, passwords or your technology consultant, and the location of your Wills file.

You should also keep an updated list of clients whose Will you are the bailee, make sure to send them reminder notices every few years that it is in your possession, and offer to inform their chosen executors and close family members that the Will is in your possession.

➔ **Have a policy as to what client Wills to hold in your possession; any client who would realistically outlive your practice is often not a suitable candidate's Will to keep in your possession.**