Form, requisites and execution

No particular form of words is necessary for a will or codicil. Reference to a will in this book also includes a codicil. Certain formal requisites must be accomplished for the validity of either. A will must be written. The testator must sign the will at the end or his name must be subscribed at the end of the will by some other person in his presence and by his direction. The testator must sign first or acknowledge that he has previously signed the will or that another person has subscribed the testator's name to it at his direction, all in the presence of at least two attesting witnesses, except a military testamentary instrument executed under Title 10, Section 1044d, United States Code. The attesting witnesses must sign the will in the presence of the testator and in the presence of each other. Duplicate wills should not be executed. The attorney should retain a xerox copy of the executed will, if he prepared it. Any person competent to be a witness at the time of attestation may act as a witness to a will. A will is not invalid because the will is witnessed by a person who receives a devise under the will or is appointed a personal representative. An express request by the testator for the attesting witnesses to subscribe their names to a will is not a prerequisite to the validity of the will. The attesting witnesses do not need to know that the instrument they are witnessing is a will. A witness need not ascertain that a testator has testamentary capacity or that the instrument is being executed voluntarily. Both witnesses must sign in the presence of the testator and each other. The purpose of attesting witnesses is to assure the authenticity of the will and to avoid fraud and imposition. A person who acts as the scrivener of the will may perform the act of signing the testator's name at his request and may also be an attesting witness. Three customary methods of affixing the testator's signature when the testator is unable to sign the will himself are to have the testator:

1. make his mark at the place for the signature;
2. touch the hand of the person the testator directs to subscribe the testator's name to the will; or
3. direct the scrivener to sign the testator's name so long as this is done in the presence of the attesting witnesses.

The witnesses must be in each other's presence and that of the testator. An attestation clause is not necessary to the validity of the will so long as the formalities for execution of the will have been observed, but the clause creates a presumption of legal execution of the will. The competency of a witness is determined by the same rules as those concerning the competency of witnesses in other matters so intelligence and not age is the proper test. The competency is determined as of the date of attestation. If the witness is not competent at the time of probate or cannot testify about execution of the will for any reason, the will is not invalid so long as the will can be proved by another witness or procedure. An attesting witness who received an interest under a will was not competent to testify to its execution until 1752 in England. In that year a statute was enacted that made the witness competent, but declared his interest under the will void. This remained
the law in Florida until 1933 when a statute was enacted making an exception to the rule if there were a sufficient number of witnesses to the will without counting the interested beneficiary. This was eliminated in 1979.  
Since the present statute requires the witnesses to sign a will as such, a question remains about the validity of a will witnessed by an illiterate. A modern development that is particularly helpful in the probate of wills is the concept of self-proof of a will. This permits the attesting witnesses and the testator to execute a self-proving certificate at the time of executing the will that takes the place of the proof of the will in the probate proceeding. The self-proving certificate is a part of the will. Changes on the face of an executed will are presumed to be made after execution. The presumption can be rebutted. Changes made after execution have no effect unless made with the same formalities as are required for executing a will. Merely initialing the changes is not sufficient because the testator must also reaffix his signature and have it reattested. Changes made by a stranger to it are a spoliation of it. It can be admitted to probate if the changes can be established so its original intent is reestablished.

A testator must know and understand the contents of his will. If he can read and write, his signature raises a presumption that he knew and understood the will contents. If the testator is blind or illiterate, the will must be read to him before execution in the presence of the witnesses who will attest to it or others who can testify to the reading. The presumption of knowledge and understanding is rebuttable.


Footnotes

2 § 732.502(1), (3), (5) F.S.A.; see Simpson v. Williamson, 611 So. 2d 544 (Fla. 5th DCA 1992); see also In re Schiele's Estate, 51 So. 2d 287 (Fla. 1951) on treating the notary as a witness and Bain v. Hill, 639 So. 2d 178 (Fla. 3d DCA 1994) on a witness signing before the testator; Bradley v. Bradley, 371 So. 2d 168 (Fla. 3d DCA 1979); see Bain v. Hill, 639 So. 2d 178 (Fla. 3d DCA 1994) on the "end" of the will. See In re Williams' Estate, 182 So. 2d 10 (Fla. 1965), for executing by an "x." See In re Charry's Estate, 359 So. 2d 544 (Fla. 4th DCA 1978) on the witnesses signing only the self-proving certificate.
4 § 732.504(1) F.S.A.
5 § 732.504(2) F.S.A.
6 Gair v. Lockhart, 45 So. 2d 193 (Fla. 1950). The present statute is substantially the same as former § 731.07 F.S.A., then in effect.
7 In re Beakes' Estate, 306 So. 2d 99, 71 A.L.R.3d 873 (Fla. 1974).
8 In re James' Estate, 140 Fla. 463, 191 So. 830 (1939); In re Wognum's Estate, 279 So. 2d 66 (Fla. 4th DCA 1973); cf. Mulford v. Central Farmers Trust Co., 99 Fla. 600, 126 So. 762 (1930) that has not been followed.
9 § 732.502(1)(c) F.S.A.; In re Watkins' Estate, 75 So. 2d 194, 45 A.L.R.2d 1360 (Fla. 1954). See also§ 732.502(1), (3), (5) F.S.A.; see Simpson v. Williamson, 611 So. 2d 544 (Fla. 5th DCA 1992); see also In re Schiele's Estate, 51 So. 2d 287 (Fla. 1951) on treating the notary as a witness and Bain v. Hill, 639 So. 2d 178 (Fla. 3d DCA 1994) on a witness signing before the testator; Bradley v. Bradley, 371 So. 2d 168 (Fla. 3d DCA 1979); see Bain v. Hill, 639 So. 2d 178 (Fla. 3d DCA 1994) on the "end" of the will. See In re Williams' Estate, 182 So. 2d 10 (Fla. 1965), for executing by an "x." See In re Charry's Estate, 359 So. 2d 544 (Fla. 4th DCA 1978) on the witnesses signing only the self-proving certificate.
10 In re Watkins' Estate, 75 So. 2d 194, 45 A.L.R.2d 1360 (Fla. 1954).
11 In re Lomineck's Estate, 155 So. 2d 561 (Fla. 1st DCA 1963).
12 § 732.502(1)(c) F.S.A.; Ziegler v. Brown, 112 Fla. 421, 150 So. 608 (1933); In re Williams' Estate, 182 So. 2d 10 (Fla. 1965); In re Lomineck's Estate, 155 So. 2d 561 (Fla. 1st DCA 1963).
13 In re Charry's Estate, 359 So. 2d 544 (Fla. 4th DCA 1978).
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14 Woodruff v. Hundley, 127 Ala. 640, 29 So. 98 (1900); Underwood v. Thurman, 111 Ga. 325, 36 S.E. 788 (1900); In re Maresh's Will, 177 Wis. 194, 187, 187 N.W. 1009 (1922).

15 § 732.504(1) F.S.A.; Clinton v. State, 53 Fla. 98, 43 So. 312 (1907).

16 In re Lubbe's Estate, 142 So. 2d 130, 95 A.L.R.2d 1246 (Fla. 2d DCA 1962) (overruled by, In re Johnson's Estate, 359 So. 2d 425 (Fla. 1978)).

17 § 733.201(3) F.S.A.

18 Former § 731.07(5) F.S.A.; § 732.504(2) F.S.A.


20 § 732.502(1) F.S.A. Everything in the statute presupposes that the testator signed first.

21 § 732.503 F.S.A.; In re Kavcic's Estate, 341 So. 2d 278 (Fla. 1st DCA 1977).

22 Hicks v. Rushin, 228 Ga. 320, 185 S.E.2d 390 (1971).

23 In re Golden's Estate, 211 So. 2d 234 (Fla. 4th DCA 1968).

24 Musgrove v. Holt, 153 Ark. 355, 240 S.W. 1068 (1922); In re Thomas' Will, 76 Minn. 237, 79 N.W. 104 (1899); In re Diener's Estate, 79 Neb. 569, 113 N.W. 149 (1907).

25 Massachusetts Audubon Soc. v. Ormond Village Imp. Ass'n, 152 Fla. 1, 10 So. 2d 494 (1942); In re Shifflet's Estate, 170 So. 2d 96 (Fla. 3d DCA 1964); Lowy v. Roberts, 453 So. 2d 886 (Fla. 3d DCA 1984).


27 In re Shapter's Estate, 35 Colo. 578, 85 P. 688 (1905).
