

Wills: Tennessee

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A Q&A guide to the law of wills in Tennessee. This Q&A addresses state laws and customs that impact wills, including the key statutes and rules related to wills, the rules of intestacy, the requirements for creating a valid will, common will provisions, information concerning fiduciaries, information regarding making changes to wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills. Answers to questions can be compared across a number of jurisdictions (see Wills: State Q&A Tool).

Key Statutes and Rules

1. What are the key statutes and rules that govern wills in your state?

In Tennessee, the rules and laws related to wills and probate proceedings are found in the Tennessee Code Annotated, which includes laws applicable to:

- Wills (T.C.A. §§ 32-1-101 to 32-11-113).
- Descent and distribution, including intestacy, simultaneous death, elective share, and other related topics (T.C.A. §§ 31-1-101 to 31-7-117).
- Fiduciaries and trusts, including testamentary trusts (T.C.A. §§ 35-2-101 to 35-50-125).
- Probate administration (T.C.A. §§ 30-1-101 to 30-5-105).

Who Can Create a Will

2. Is there a minimum age requirement to create a will?

In Tennessee, a person must be 18 years of age or older to make a will (T.C.A. § 32-1-102).

3. What is the standard of mental capacity required to create a will?

A person must be of sound mind to make a valid will in Tennessee (T.C.A. § 32-1-102). A person is of sound mind if the person knows and understands the force and consequence of the person's act, despite a person's physical weakness or disease, old age, blunt perception, or failing mind or memory (*Am. Tr. & Banking Co. v. Williams*, 225 S.W.2d 79, 83 (Tenn. Ct. App. 1948)).

4. Can an agent under a power of attorney create a will on behalf of a testator?

There is no authority in Tennessee for an agent to create a will for a testator without the testator's participation in the acknowledgment and execution of the instrument (T.C.A. §§ 34-6-101 to 34-6-112).

However, if a testator acknowledges to attesting witnesses that an instrument, other than a holographic or nuncupative will, is the testator's will, another person can sign the testator's name:

- At the testator's direction.
- In the testator's presence.
- In the presence of two or more attesting witnesses.

(T.C.A. § 32-1-104(a)(1).)

Permissible Form of Will

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.
- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

Handwritten (Holographic) Wills

Tennessee allows handwritten, or holographic, wills. The testator's signature and all material provisions of a holographic will must be in the testator's handwriting. The will does not need to be witnessed, but two witnesses must prove the testator's handwriting, including the testator's signature. (T.C.A. § 32-1-105.) Lay witnesses to the testator's handwriting are acceptable (the witnesses do not have to be handwriting experts) (see *In re Last Will & Testament of Erde*, 2017 WL 6622817, *6 (Tenn. Ct. App. 2017)). The instrument must clearly demonstrate that the testator intended it to be the testator's will (*Smith v. Smith*, 232 S.W.2d 338, 341 (Tenn. Ct. App. 1949)).

If a testator writes a holographic will within six months of the testator's death and the testator died by suicide:

- Tennessee presumes suspicious circumstances.
- The will proponent must present evidence demonstrating the testator's capacity to execute the will.

(T.C.A. § 32-4-105(b); see Question 3.)

Oral (Nuncupative) Wills

Tennessee permits oral wills only by a testator who is about to die from illness or otherwise, and who dies as the result of that imminent peril, if the testator's oral statement is:

- Declared by the testator to be the testator's will in the presence of two disinterested witnesses.
- Reduced to writing by or under the direction of one of the witnesses within 30 days from its declaration by the testator.
- Submitted for probate within six months after the testator's death.

(T.C.A. § 32-1-106(a).)

Oral wills may only dispose of personal property with an aggregate value up to \$1,000. If the testator making the oral will is active duty military in a time of war, the aggregate value is increased to \$10,000. (T.C.A. § 32-1-106(b).)

An oral will cannot revoke or change an existing written will (T.C.A. § 32-1-106(c)).

Contractual Wills

A contract to make or revoke a will is valid and can be established by either:

- Provisions of a will stating the material terms of the contract.
- An express reference to the contract in a will and extrinsic evidence to establish the terms of the contract.
- A writing signed by the decedent evidencing the contract.

(T.C.A. § 32-3-107(a).)

There is no presumption in Tennessee that a testator entered into a contract to make a will or not to revoke a will because the testator executed joint or mutual wills (T.C.A. § 32-3-107(b)). Parol evidence is admissible to demonstrate that wills were made in consideration of each other (*Petty v. Estate of Nichols*, 569 S.W.2d 840, 843 (Tenn. Ct. App. 1977)).

Statutory Wills

Tennessee law does not authorize statutory wills.

Electronic Wills

Tennessee law does not authorize electronic wills.

Out-of-State Wills

Tennessee gives full faith and credit to wills that are submitted to probate in Tennessee if the instrument was executed according to either:

- Tennessee's will execution requirements.
- The laws of the place of its execution.
- The laws of the testator's domicile at the time of execution.

(T.C.A. § 32-1-107.)

Will Execution Requirements

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving affidavit.
- If electronic wills are permitted, any different execution requirements.

Testator's Signature

For a Tennessee will, other than a holographic or nuncupative will, to be valid, the testator must signify to at least two attesting witnesses that the instrument is the testator's will. The will must be executed by both:

- The signature of the testator.
- At least two attesting witnesses.

(T.C.A. § 32-1-104(a).)

In the presence of at least two attesting witnesses, the testator must then either:

- Sign the will.
- Acknowledge the testator's signature already made.
- Have another person sign the testator's name both:
 - at the testator's direction; and
 - in the testator's presence.

(T.C.A. § 32-1-104(a)(1).)

Witness Requirements

In Tennessee, the attesting witnesses must sign the will in the presence of the testator and each other (T.C.A. § 32-1-104(a)(2)).

Any person competent to be a witness can act as an attesting witness to a will. A witness is competent if the witness is of sound mind and proper age to witness a will and understand it to be testator's will. (T.C.A. § 32-1-103(a); see *In re Est. of Abbott*, 2018 WL 3689490, *2 (Tenn. Ct. App. 2018).)

A will is still valid even if attested to by an interested witness. An interested witness is a witness with some personal or beneficial interest in the will. However, unless the will is also attested to by two disinterested witnesses, any interested witness can only receive a bequest up to value of the witness's intestate share, if any. (T.C.A. § 32-1-103.)

For a will executed before July 1, 2016, the signatures of witnesses to a self-proving affidavit are considered signatures to the will itself if:

- The signatures are necessary for the will to be validly executed.
- The signatures are made:
 - when the testator signs the will;
 - in the testator's presence; and
 - in the presence of each other.
- The affidavit meets the same requirements as a self-proving affidavit (see Self-Proving Affidavit).

(T.C.A. § 32-1-104(b)(1); *In re Estate of Stewart*, 545 S.W.3d 458, 460-61 (Tenn. Ct. App. 2017).) If the witnesses sign the affidavit on the same day as the testator signs the will, there is a rebuttable presumption that the witnesses signed at the same time as the testator. This presumption can be rebutted by clear and convincing evidence. However, if the witnesses' signatures on the affidavit are treated as signatures on the will, the affidavit cannot also be used as a self-proving affidavit. (T.C.A. § 32-1-104(b)(2).)

Notary Requirements

Neither the testator's signature nor the witnesses' signatures to the will must be notarized. However, witnesses to a self-proving affidavit must sign under oath (T.C.A. § 32-2-110; see Self-Proving Affidavit).

Sample Attestation Clause

A typical attestation clause in Tennessee sets out the requirements of a valid execution as follows:

"SIGNED, DECLARED AND PUBLISHED by the said [TESTATOR NAME], as the Last Will of the testator, in the presence of us, the undersigned, who, at the testator's request and in the sight and presence of the testator and each other, have subscribed our names hereto as attesting witnesses on the date above written."

Self-Proving Affidavit

A self-proving affidavit is an optional, separate document that:

- Is often attached at the end of a will.
- Can be executed:
 - at the same time as the will or after the will, at the testator's request
 - after the testator's death at the request of the executor or any person interested under the will.
- Establishes the facts to which the witnesses would be required to testify before a court to establish the valid execution of the will.
- Is considered proof of the valid execution of the testator's will when the will is presented for probate and not contested.
- Is not considered to be part of the will.
- Must be notarized by any officer authorized to administer oaths in or out-of-state.

(T.C.A. § 32-2-110; see Witness Requirements.)

Electronic Will Execution Requirements

Tennessee does not currently recognize electronic wills as valid testamentary instruments.

Limitations on Gifts to Fiduciaries and Attorney Draftsperson

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

Gifts to Executors

Tennessee does not prohibit gifts in a will to individuals named as executors in the will (see *Maupin v. Maupin*, 62 S.W. 1110, 1113 (Tenn. Ct. Ch. App. 1901)). However, the

bequest's validity may be questioned if the individual had a confidential relationship with the testator (see Gifts to Lawyer Draftsperson).

Gifts to Trustees Named in the Will

Tennessee does not prohibit gifts in a will to individuals named as testamentary trustees, although the bequest's validity may be questioned if the individual had a confidential relationship with the testator (see Gifts to Lawyer Draftsperson).

Gifts to Guardians

Tennessee does not prohibit gifts in a will to individuals named as guardians, although the bequest's validity may be questioned if the individual had a confidential relationship with the testator (see *Parham v. Walker*, 568 S.W.2d 622, 625 (Tenn. Ct. App. 1978); Gifts to Lawyer Draftsperson).

Gifts to Lawyer Draftsperson

Attorneys generally cannot:

- Solicit any substantial gift from a client to the attorney or a person related to the attorney, including a testamentary gift.
- Prepare for a client an instrument giving the lawyer or a person related to the client any substantial gift.

(TN R S CT Rule 8, RPC 1.8(c).) Attorneys may do so only if the attorney or other recipient of a gift is related to the client. A person related to the attorney or related to the client includes a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship. (TN R S CT Rule 8, RPC 1.8(c).) Though Tennessee does not provide specific guidance on what is a substantial gift, Tennessee defines substantial as a material matter of clear and weighty importance (TN R S CT Rule 8, RPC 1.0(l).)

The existence of a fiduciary or confidential relationship, such as that between an attorney and the attorney's testator client, gives rise to a rebuttable presumption of the invalidity of the testator's gift to the fiduciary or confidant, except where the fiduciary or confidant is related to the client. The rebuttable presumption of invalidity can generally be overcome by showing the testator received independent advice concerning the gift at issue. (TN R S CT Rule 8, RPC 1.8, cmts. 6, 7; *Roberts v. Chase*, 166 S.W.2d 641, 650-51 (Tenn. Ct. App. 1942).)

Rights of Family Members to Inherit

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

Disinheriting a Testator's Spouse

In Tennessee, spouses cannot be disinherited, except to the extent there is a valid prenuptial or postnuptial agreement in which the surviving spouse expressly waives the right to inherit (T.C.A. § 36-3-501). Within nine months from the decedent's date of death, the surviving spouse may choose to elect against the deceased spouse's will and petition for certain statutory allowances. The allowances include:

- Year's Support (see One Year's Support).
- A homestead allowance (see Homestead).
- Certain exempt property (see Exempt Property).
- The spousal elective share (see Elective Share).

One Year's Support

A surviving spouse of an intestate decedent or a spouse electing against the decedent's will is entitled to a reasonable allowance out of estate funds for the surviving spouse's maintenance for one year after the decedent's death, considering the surviving spouse's standard of living, the condition of the decedent's estate, and assets passing to the spouse outside of probate. This allowance:

- May be paid to the surviving spouse, allocated by the court between the surviving spouse and unmarried minor children, or if there is no surviving spouse, made to the surviving unmarried minor children.
- Is exempt from all claims against the decedent's estate.
- Is not payable out of proceeds from the sale of the decedent's real property to pay debts, because it is not a debt of the decedent.
- Is not paid if insufficient funds or personal property exist in the estate to pay this allowance. (*In re Estate of Morris*, 104 S.W.3d 855, 860-61 (Tenn. Ct. App. 2002).

(T.C.A. § 30-2-102.)

Homestead

A surviving spouse may apply to have the probate court set aside either:

- A life estate valued at \$35,000 for the benefit of a surviving spouse in the deceased spouse's real property subject to administration.
- If a life estate in real property cannot be set apart, proceeds from the sale of the decedent's real property \$35,000 either invested in real estate under the court's direction or, if the court prefers, distributed to the surviving spouse or minor children instead of the homestead right.

If there is no surviving spouse, the minor children of the decedent may claim this homestead right instead. (T.C.A. §§ 30-2-201 and 30-2-209.)

Exempt Property

A surviving spouse of an intestate decedent or a spouse electing against the decedent's will can receive from the decedent's estate tangible personal property valued up to \$50,000 provided the personal property was normally used around the residence and not for trade or business or investment. This personal property may include vehicles not used for trade or business. (T.C.A. § 30-2-101(a)(1).) If there is no surviving spouse, the decedent's unmarried minor children are entitled to this property instead, excluding vehicles (T.C.A. § 30-2-101(a)(2)).

Elective Share

A surviving spouse may elect against taking an intestate share or against the decedent's will and receive an elective share based on the length of the marriage as follows:

- If less than three years, 10% of the net estate;
- If at least three but less than six years, 20% of the net estate.
- If at least six but less than nine years, 30% of the net estate.
- If nine years or more, 40% of the net estate.

(T.C.A. § 31-4-101(a)(1).)

The net estate for elective share purposes includes all the decedent's real and personal property that is subject to disposition under the will or under intestate succession, reduced by:

- The secured debts owed to creditors.
- The funeral and administration expenses.
- The award of exempt property.

- The homestead allowance.
- The year's support allowance.

(T.C.A. § 31-4-101(b).)

The net estate calculation does not include assets passing outside probate and not payable to the decedent's estate, such as life insurance policies paying out to a specific beneficiary (*In re Estate of Jenkins*, 8 S.W.3d 277, 281-82 (Tenn. Ct. App. 1999)).

The value of any assets over which the decedent had a power of appointment is not included to calculate the net estate unless the decedent exercises the power of appointment to direct the assets to be paid to the decedent's personal representative for administration as part of the decedent's probate estate (T.C.A. § 31-4-101(b)).

After the elective share is calculated, the amount payable to the surviving spouse is reduced by the value of all assets in the decedent's gross estate that were transferred to or paid for the benefit of the surviving spouse, such as property in trusts, one-half of the value of real property owned tenants by the entireties with the deceased spouse, life insurance proceeds, and other non-probate property, excluding:

- The homestead.
- Exempt property.
- The year's support allowance.

(T.C.A. § 31-4-101(c).)

The surviving spouse may elect to take the elective share after the decedent's date of death by, within nine months of decedent's death, either:

- Filing a petition for the elective share in court.
- Mailing or delivering the petition to the personal representative.

(T.C.A. § 31-4-102(a)(1).)

The surviving spouse's death does not extinguish the statutory elective share right to the decedent's property, which the personal representative of the surviving spouse may timely make on behalf of the surviving spouse by filing a petition. The personal representative of the surviving spouse's estate may withdraw a petition before entry of a final determination by the court. (T.C.A. § 31-4-105.)

Disinheriting a Child of the Testator

Children of a decedent generally have no right to inherit unless the child is pretermitted or a minor at the time of the decedent's death, under certain circumstances

(see Question 14: After-Born Child). A minor child is entitled to the following statutory allowances:

- **One year's support.** Funds from the decedent's estate may be set aside for the maintenance of an unmarried minor child of the decedent (T.C.A. § 30-2-102(b); see One Year's Support).
- **Homestead.** A minor child is entitled to a homestead exemption, which is a life estate in real estate valued at \$35,000 that is surveyed and set apart from lands owned by the decedent or paid from assets in the estate if the homestead cannot be set aside. (T.C.A. §§ 30-2-201 and 30-2-209; see Homestead).
- **Exempt property.** An unmarried minor child, if there is no surviving spouse, may petition the court for the decedent's personal property valued up to \$50,000 (T.C.A. § 30-2-101(a)(2); see Exempt Property).

Common Will Provisions

9. Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or for funeral wishes.
- No-contest clause.
- Rule against perpetuities.
- Sample rule against perpetuities clause.

Incorporation by Reference

Tennessee allows documents to be incorporated by reference into a decedent's will even if the writing being incorporated is not formally executed or is not attested. However, the will must properly identify the writing and the reference must be unmistakable or capable of being established. (*Smith v. Weitzel*, 338 S.W.2d 628, 635 (Tenn. Ct. App. 1960).)

Incorporated documents generally do not have to be witnessed or attached to the decedent's will (*Weitzel*, 338 S.W.2d at 638). However, a document is only incorporated if the following requirements are met:

- The court admits the document to probate as part of the will (*Weitzel*, 338 S.W.2d at 638).
- The will expressly refers to the document.

- There is proof that the document was written before or contemporaneously with the will. A document prepared after the will's execution cannot be admitted to probate as a part of the will unless it was incorporated by an after-executed codicil.
- The document referenced in the will is identifiable as the document to be incorporated.

(*Howell v. Moore*, 14 Tenn. App. 594, 633-34 (1930) and *Goodwin v. Nave*, 912 S.W.2d 719, 722 (Tenn. Ct. App. 1995).)

A holographic will can incorporate by reference only a document that is entirely in the testator's handwriting (*Howell*, 14 Tenn. App. at 633).

Outside Memoranda Disposing of Tangible Personal Property

In addition to the common law incorporation by reference doctrine, Tennessee statute expressly provides that a will may refer to a written statement or list to dispose of items of tangible personal property (other than money, evidences of indebtedness, documents of title, securities, and property used in a trade or business) not otherwise specifically disposed of by the will (T. C. A. § 32-3-115(a)(1)).

To be admissible to probate with the will, this writing must:

- Be:
 - in the testator's handwriting; or
 - signed by the testator.
- Be dated.
- Describe the items and the devisees with reasonable certainty.

(T. C. A. § 32-3-115(a)(2).)

The writing may:

- Be prepared before or after the execution of the will.
- Be altered by the testator after its preparation, provided that the testator signs and dates the alteration.
- Have no significance apart from its effect on the will.

(T. C. A. § 32-3-115(a)(2).)

If more than one writing exists or a single writing contains properly signed and dated alterations, the provisions of the most recent writing or alteration revoke any inconsistent provisions of all previous writings (T. C. A. § 32-3-115(a)(3)).

Disposition of Remains or for Funeral Wishes

A will may include directions for burial or for disposition of the decedent's remains in the will. However, in Tennessee, these directions are more typically found in an advance directive for health care (see [Standard Document, Advance Directive for Health Care \(TN\): Other Instructions and Anatomical Gifts](#)).

No-Contest Clause

No-contest clauses are designed to discourage a beneficiary from contesting the dispositive provisions of a testator's will. They typically provide that a contesting beneficiary and sometimes the contesting beneficiary's children and more remote issue are excluded as beneficiaries under the will if the contest is not successful.

In Tennessee, a testator may include a no-contest clause in a will. However, the court does not enforce a no-contest clause if both:

- A contestant brought the contest in good faith.
- Probable cause to challenge the will. Probable cause requires the contestant to show that under the circumstances the contest was reasonably justified.

(*Winningham v. Winningham*, 966 S.W.2d 48, 51-53 (Tenn. 1998).)

Rule Against Perpetuities

The Tennessee legislature codified the rule against perpetuities under T.C.A. §§ 66-1-201 to 66-1-208. The rule provides that any nonvested interest in property is invalid in:

- Trusts that are created or that become irrevocable after June 30, 2007, unless the beneficial interests vest or terminate within 360 years.
- All other trusts, unless either:
 - the nonvested interest is certain to vest or terminate no later than 21 years after the death of an individual then living; or
 - the nonvested interest vests or terminates within 90 years after creation.

(T.C.A. § 66-1-202(a), (f).)

Sample Rule Against Perpetuities Provision

“Termination Under the Rule Against Perpetuities. To the extent required by the applicable law of the situs of the trust (which as of the date of this instrument is T.C.A. Section 66-1-202(f)) and notwithstanding any provision in this instrument to the contrary, in no event shall any trust administered under this instrument be continued beyond the date which is the maximum perpetuities period allowed for the continuation of this trust (presently three hundred sixty (360) years after the date of my death). On that date, each trust then being administered hereunder shall be distributed, free of trust, to the person to whom the trust was apportioned, or in the case of a group trust, in equal shares among the original beneficiaries and the then living descendants, per stirpes, of any original beneficiary who is deceased.”

Executors

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executors.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

Terminology used to Identify Person in Charge of Estate

In Tennessee, a person named by a decedent in the will to serve as the fiduciary in charge of the administration and management of an estate is typically called an executor. Otherwise, if the court appoints a person to administer an estate, that person is called either:

- An administrator *c.t.a.*, which is an abbreviation of *cum testaments annex*, for a testate decedent (if there is a valid will but, for example, there is no named executor able or willing to serve or an original will naming an executor cannot be found) (T.C.A. § 30-1-115).
- An administrator, if the decedent died intestate (T.C.A. § 30-1-106).

Both executors and administrators are more generally called personal representatives (T.C.A. § 31-1-101(8)).

Qualification as Executor

Any person who can make a will generally may be named as executor. Tennessee has no statutory qualifications to serve as executor, but follows the common law, which generally requires a proposed fiduciary to be:

- Able to secure a bond as required by T.C.A. § 30-1-201(a) unless waived by the will. Therefore, a proposed fiduciary must also be an adult (a person 18 years of age or older), as a minor cannot be bonded.
- Competent (see Question 3).
- Without any felony convictions (T.C.A. § 40-20-115; see *State v. Johnson*, 79 S.W.3d 522, 527 (Tenn. 2002) and *State v. DeDreux*, 2022 WL 1115017, *2 (Tenn. Ct. App. Apr. 14, 2022)).
- Willing to faithfully discharge the fiduciary’s duties and court’s orders.

Tennessee does not have statutory guidance providing for which corporations may act as estate representatives. However, nonresidents (persons, banks, or trust companies) wanting to act as estate representatives:

- Must:
 - appoint a resident fiduciary (a person who is a Tennessee resident or a corporation authorized to do business and maintaining an office in Tennessee) (T.C.A. § 35-50-107(a)(1)); or
 - file an [Agent Appointment by Nonresident Fiduciary \(ss-4512\)](#) form with the secretary of state, which appoints the secretary of state as agent for service of process (T.C.A. § 35-50-107(b)(2)).
- Who are nonresident banks or trust companies must be organized and doing business under the laws of any US state or territory which grant similar authority for Tennessee banks or trust companies to act in that state or territory (T.C.A. § 35-50-107(a)(2)(A)).

Compensation of Executors

Executors are entitled to both:

- Reasonable compensation for services rendered.
- Reasonable good-faith expenses incurred for the estate's exclusive and necessary benefit.

(T.C.A. § 30-2-606; *In re Estate of Wallace*, 829 S.W.2d 696, 700-01 (Tenn. Ct. App. 1992).)

The determination of the reasonableness of the executor's fees and expenses is in the court's discretion. Certain counties may address the reasonableness of executors' fees in their local rules, which vary across the state (see [Tennessee State Courts, Local Rules of Practice](#) including, for example, [TN 20th District Court Rules of Practice § 39.14](#)). Local Rules of Practice may also address fees that are deemed reasonable for both professional and layperson executors, which would include corporate fiduciaries. Typically, corporate fiduciaries are paid according to their published fee schedule, unless a different fee agreement is specified in the will. All fees, whether for corporate or layperson executors, are subject to court approval.

Drafting Attorney as Executor

There is no prohibition against the drafting attorney serving as executor. However, there are instances in which the attorney should not serve as a practical matter, such as:

- In the case of a will contest in which the attorney may be a necessary witness.
- When the attorney has a professional or personal conflict of interest.

(TN R S CT Rule 8, RPC 1.7 and TN R S CT Rule 8, RPC 1.8.)

These appointments are subject to the general conflict of interest provision in the rules of professional conduct, including the material limitation provisions. In these cases, the lawyer should obtain the client's informed consent to the conflict by advising the client about:

- The nature and extent of the lawyer's financial interest in the appointment.
- The availability of alternative candidates for the position.

(TN R S CT Rule 8, RPC 1.7 and TN R S CT Rule 8, RPC 1.8, cmt. 8.) Compensation of the attorney executor is subject to court approval and must be reasonable, necessary, and inure to the benefit of the entire estate (see *In re Estate of Wakefield*, 2001 WL 1566117, *24 (Tenn. Ct. App. 2001).)

Failure of Named Executor to Qualify

If the named executor is unable or unwilling to serve, the court considers the successor executor named in the will for appointment. If there is no person able and willing to serve, the court considers the following persons, on their application to serve, in the statutory order of priority:

- The surviving spouse.
- The next of kin. Where there is more than one next of kin, the probate court may decide which kin is entitled to serve.
- A valid creditor of the decedent's estate.

(T.C.A. § 30-1-106.)

Multiple Executors

Unless otherwise provided in the will, when there is more than one executor acting, the executors must act unanimously (*Fitzgerald v. Standish*, 52 S.W. 294, 295 (Tenn. 1899)).

An executor may be held jointly and severally liable for a co-executor's the actions if the executor knew or should have known of circumstances requiring the executor to protect the estate assets (*Estate of Inman*, 588 S.W.2d 763, 767 (Tenn. Ct. App. 1979)).

Trustees

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

Qualification as Trustee

Any adult is generally qualified as a testamentary trustee in Tennessee if they can legally fulfill the duties set out under T.C.A. §§ 35-15-801 to 35-15-817, including the duty to:

- Prudently administer the trust (T.C.A. § 35-15-804).
- Control and protect trust property (T.C.A. § 35-15-809).

- Inform and report to beneficiaries where required (T.C.A. § 35-15-813(a)(1)).

However:

- Minors and incompetent individuals cannot serve as testamentary trustees, as they cannot be bonded, if required in the instrument or by the court (T.C.A. § 35-15-702).
- Individuals with a felony conviction also cannot serve (T.C.A. § 40-20-115; see *State v. Johnson*, 79 S.W.3d 522, 527 (Tenn. 2002) and *State v. DeDreux*, 2022 WL 1115017, *2 (Tenn. Ct. App. Apr. 14, 2022)).
- Nonresident trustees (persons, banks, or trust companies):
 - Must either appoint a resident fiduciary (a person who is a Tennessee resident or a corporation authorized to do business and maintaining an office in Tennessee) or file an [Agent Appointment by Nonresident Fiduciary \(ss-4512\)](#) form with the secretary of state, which appoints the secretary of state as agent for service of process (T.C.A. §§ 35-50-107(a)(1), (b)(2)).
 - Who are nonresident banks or trust companies must be organized and doing business under the laws of any US state or territory which grant similar authority for Tennessee banks or trust companies to act in that state or territory ((T.C.A. § 35-50-107(a)(2)(A)).

While there are few statutory requirements for a person to be named as trustee, any trustee can be removed for certain reasons, including a failure to qualify (see Removal of Trustee).

Qualified Beneficiary

A qualified beneficiary at any given time is a beneficiary who (assuming the non-exercise of all powers of appointment and the non-occurrence of any event not reasonably expected to occur) either:

- Is distributee or permissible distributee of trust income or principal.
- Would be a distributee or permissible distributee if the current distributees' and permissible distributees' interests terminated at that time without causing the trust to terminate.
- Would be a distributee of income or principal if the trust terminated on the date the beneficiary's qualification is determined.

(T.C.A. § 35-15-103(24).)

However, an ultimate beneficiary or potential ultimate beneficiary is not a qualified beneficiary. An ultimate

beneficiary or potential ultimate beneficiary is any beneficiary the settlor did not reasonably anticipate takes any interest on termination absent all other beneficiaries or members of classes of beneficiaries named in the trust instrument predeceasing or otherwise not in existence at the time of trust termination.

For example, trusts often include ultimate beneficiaries to take an interest on termination of the trust only where all other named beneficiaries or classes of beneficiaries that have or had an affinity through either familial connection or friendship with the settlor, or any prior or potential trust beneficiary are predeceased or not in existence at the trust's termination.

In determining who is or may be an ultimate beneficiary, Tennessee considers:

- The terms of the trust naming any ultimate beneficiary or potential ultimate beneficiary and the settlor's intention relative to that beneficiary as expressed in those terms.
- Any terms or provisions related to the exercise of any power by any person naming any ultimate beneficiary or potential ultimate beneficiary and the intention of the person exercising that power relative to any such beneficiary as expressed in those terms or provisions.

(T.C.A. § 35-15-103(24)(D).)

Removal of Trustee

A settlor, co-trustee or qualified beneficiary may request the court to remove a trustee or the court may remove a trustee on its own initiative (T.C.A. § 35-15-706(a)). The court may remove a trustee:

- For committing a serious breach of trust.
- If there is a lack of cooperation among co-trustees that substantially impairs the trust's administration.
- For being unfit, unwilling, or persistently failing to effectively administer the trust and a court determines that the beneficiary's best interests are served by removing the trustee.
- If there was a substantial change of circumstances or all qualified beneficiaries request removal and:
 - the court finds that removal serves the beneficiary's best interests;
 - removal is not inconsistent with the trust's material purpose; and
 - a suitable co-trustee or successor trustee is available.

(T.C.A. § 35-15-706; see Qualified Beneficiary.)

Compensation of Trustee

Testamentary trustee compensation is determined by the trust terms. If the trust is silent, a majority of the qualified beneficiaries may agree on the trustee's compensation. Otherwise, a trustee is entitled to reasonable compensation under the circumstances. (T.C.A. § 35-15-708(a); see Qualified Beneficiary.)

The court may allow more or less trustee compensation if either:

- The trustee's duties are substantially different from what was contemplated when the trust was created.
- The compensation the trust specifies is unreasonably high or low.

(T.C.A. § 35-15-708(b).)

The court considers the following factors in determining the reasonableness of a trustee's compensation:

- The size of the trust.
- The nature and number of assets.
- The income produced by the trust assets.
- The time and responsibility involved in administering the trust.
- The expertise required to administer the trust.
- Any management or sale of real property or closely held business interests.
- Any involvement in litigation to protect trust property.
- Any other relevant factors.

(T.C.A. § 35-15-708(c).)

Failure of Named Trustee

A vacancy in the trusteeship of a non-charitable trust in Tennessee is filled in the following priority:

- By a designated successor in the trust agreement.
- By a person appointed unanimously by the qualified beneficiaries (see Qualified Beneficiary).
- By a person appointed by the court.

(T.C.A. § 35-15-704(c).)

Multiple Trustees

Unless the trust agreement provides otherwise, co-trustees typically act by unanimous decision. If they cannot do so, they may act by majority decision. (T.C.A. §§ 35-15-105(b) and 35-15-703(a).)

Guardians

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

Qualification as Guardian

In Tennessee, a person may be appointed guardian of a minor in the following order of priority:

- The parent of the minor.
- A person designated by the parent in a will or other document.
- An adult sibling of the minor.
- The closest relative of the minor.
- Other persons in the discretion of the court.

(T.C.A. § 34-2-103.)

As with other fiduciary roles, individuals with a felony conviction cannot serve as guardian (T.C.A. § 40-20-115; see *State v. DeDreux*, 2022 WL 1115017, *2 (Tenn. Ct. App. Apr. 14, 2022)).

While there are no statutory qualifications for a guardian, the person appointed may be disqualified if they cannot be bonded, which the court could impose unless both:

- The requirement of a bond would be unjust or inappropriate.
- One of the following conditions exists:
 - the proposed guardian is an exempt financial institution;
 - the minor's assets being managed by the proposed guardian are less than \$10,000 total and the court finds that the expense of the bond outweighs the risks of foregoing it;
 - the document naming the proposed guardian waives a bond;
 - the minor's assets to be managed by the proposed guardian are with a financial institution and the institution agrees in a court-approved writing not

to permit the proposed guardian to withdraw funds without court approval;

- the minor’s assets to be managed by the proposed guardian are deposited with the clerk and master or the clerk of the court; or
- the proposed guardian is guardian of the person of the minor but has not also been appointed guardian of the minor’s property.

(T.C.A. § 34-1-105(b).)

Guardianship Binding or Persuasive

The testator’s nomination of a guardian is persuasive but not binding on the court. Nominating a guardian in a will does not guarantee that the named guardian is appointed. Statute provides an order of priority for appointing a guardian. If both parents are deceased (or the minor child otherwise requires a guardian), the person or persons designated by the parent or parents in a will or other document have priority. However, the statutory order of appointment is subject to the court’s determination of what is in the best interests of the minor. (T.C.A. § 34-2-103.)

Termination of Guardianship

The appointment of a guardian terminates automatically when the child reaches age 18. The guardianship may be extended to age 25 if a petition to do so is brought within 90 days of the minor reaching age 18 and is approved by the court. (T.C.A. § 34-2-106.)

Changes to Will After Execution

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.
- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

Modification of a Will

In Tennessee, a testator can modify a will by executing a codicil to add to or change provisions of an existing will or codicil (*Third Nat’l Bank v. Scribner*, 130 S.W.2d 126, 131 (Tenn. 1939)). When probated, the original will and the valid codicil or codicils are presented for probate.

The same proof is required to establish the codicil as is required to probate the original will. (*In re Estate of Boote*, 198 S.W.3d 699, 711 (Tenn. Ct. App. 2005); see *Hooper v. McQuary*, 45 Tenn. 129, 131 (1867).) The court can also modify a will if necessary to achieve the testator’s tax objectives (T.C.A. § 32-3-114).

Revocation of a Will

A testator may revoke a will in whole or in part by:

- Executing a later will, other than an oral will, that revokes the earlier will either:
 - expressly; or
 - by making an inconsistent disposition of the same assets.
- Executing a document with the same formalities as an attested or holographic will that revokes the prior will.
- Burning, tearing, or destroying the will, or by directing another person to do so in the testator’s presence.
- The testator’s marriage combined with the later birth of a child of the testator. A divorce or annulment of the marriage does not revive a prior will (see Question 14: Effect of Marriage and After-Born Child).
- The divorce or annulment of testator’s marriage revokes will provisions regarding the former spouse (see Question 14: Effect of Divorce).

(T.C.A. §§ 32-1-201 and 32-1-202.)

Reinstatement of a Will

Tennessee courts apply the doctrine of dependent relative revocation to revive an earlier will by revocation of a later will in some instances. Dependent relative revocation requires a valid revocation and an intention to revive the prior will (*Briscoe v. Allison*, 290 S.W.2d 864, 866 (Tenn. 1956).).

The testator must intend to revoke the will for a revocation to be effective. Therefore, revoking a will, even by burning, tearing, or defacing it is conditional. These acts, if performed because of fraud, undue influence, or mistake are ineffective to revoke the will. (*Briscoe*, 290 S.W.2d at 866.)

Revocation of a will does not automatically revive an earlier will. The testator must intend to revive the earlier will and that intention must be established by a preponderance of the evidence. (*Ewell v. Rucker*, 187 S.W.2d 644, 647-48 (Tenn. Ct. App. 1945); *In re Estate of John Tyler McKelvey*, 2018 WL 2264087, *3 (Tenn. Ct. App. 2018).) If the testator preserved an earlier will after

the destruction of a later will that is revoked, the testator expressed an intent to republish the earlier will, absent any contrary facts (*In re Estate of John Tyler McKelvey*, 2018 WL 2264087, *4 (Tenn. Ct. App. 2018)).

Special Circumstances Regarding Gifts or Recipients

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.
- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

Beneficiary Does Not Survive

Under Tennessee's anti-lapse statute, if a beneficiary of an immediate devise or bequest does not survive the testator but is survived by issue, the surviving issue take the bequest unless the will directs a different contingent disposition (T.C.A. § 32-3-105).

Gift Not Owned by Testator at Death

A specific bequest of real or personal property not owned by the testator at death lapses under the common law doctrine of ademption by extinction. Ademption arises when a specific bequest cannot be made because the property bequeathed does not exist in the testator's estate. In that case, the beneficiary does not receive that bequest or its equivalent value. (*In re Estate of Hume*, 984 S.W.2d 602, 604 (Tenn. 1999).)

However, there are exceptions to this general rule. For example, the beneficiary of an adeemed gift receives certain sums instead of the adeemed gift, including:

- The balance of the purchase price, along with any security interest due to the sale of the property owed to the testator at death.

- Any condemnation award for the taking of the property unpaid at death.
- Any insurance proceeds payable regarding the property unpaid at death.
- Property owned by the testator at death and acquired from foreclosure, or obtained instead foreclosure, of the security interest for a specifically devised obligation.
- A general pecuniary devise equal to the net sale price, amount of an unpaid loan, condemnation award, insurance proceeds, or recovery of specifically devised property if the property was sold or mortgaged by a conservator or by an agent under power of attorney or if a condemnation award, insurance proceeds, or recovery for injury to the property are paid to a conservator or to an agent under durable power of attorney while the testator was incapacitated.

(T.C.A. § 32-3-111(a), (b).)

Not Enough Assets

General bequests (excluding ones given for valuable consideration, such as to a creditor in payment or discharge of a debt) abate proportionately before specific bequests, if there are insufficient assets to pay debts from the estate's residue (*Maupin*, 62 S.W. at 1112-133; *Leaver v. McBride*, 506 S.W.2d 141, 145 (Tenn. 1974)).

Gifted Property Encumbered

A beneficiary generally takes property distributed under a decedent's will free of encumbrances, unless the will specifically directs otherwise. Beneficiaries are not entitled to exoneration on devised property in an intestate estate. Property passing outside of probate also does not enable the beneficiary to claim exoneration unless the will or other relevant testamentary document (such as a trust) specifically provides for exoneration of that asset. (*In re Estate of Vincent*, 98 S.W.3d 146, 148-49 (Tenn. 2003).)

Effect of Divorce

Unless the will expressly provides otherwise, a testator's divorce, or the annulment of the testator's marriage, revokes any:

- Disposition or appointment of property to the former spouse in the testator's will.
- Provision in the testator's will conferring a power of appointment on the former spouse.
- Nomination of the former spouse as executor, trustee, conservator, or guardian.

(T.C.A. § 32-1-202(a).)

The will is read as if the former spouse died before the testator (T.C.A. § 32-1-202(b)).

Effect of Marriage

Any spouse, including a spouse who married the testator after the testator executed the testator's will, is entitled to the statutory set asides for a spouse, including:

- Homestead.
- Year's support.
- Exempt property.
- Elective share rights.

(See Question 8: Disinheriting a Testator's Spouse.)

A testator's marriage and birth of a child of the testator, after the testator executed the testator's will, revokes that will. In this case, the divorce or annulment of the subsequent marriage does not revive a prior will. In this case:

- Tennessee deems the testator to have died intestate.
- The divorce or annulment of the subsequent marriage does not revive the prior will.

(T.C.A. § 32-1-201(4).) Remarriage to a former spouse reinstates provisions for that spouse in the testator's will that their divorce made ineffective under T.C.A. § 32-1-202. (T.C.A. § 32-1-202(c); see Effect of Divorce).

After-Born Child

An after-born, or pretermitted, child is a child:

- Born after the testator made the testator's will.
- Born before or after the testator's death.
- Not provided for or disinherited in the testator's will.
- Not otherwise provided for by settlement made by the testator during the testator's lifetime.

(T.C.A. § 32-3-103(a).)

The after-born child is entitled to a child's share as if the testator died intestate. The after-born child's portion of the estate is made by proportional contribution from the devisees and legatees under the testator's will. (T.C.A. § 32-3-103; see Question 8: Disinheriting a Child of the Testator.)

Beneficiary Causes Testator's Death

An individual feloniously and intentionally killing a decedent forfeits:

- All benefits from the decedent's estate, including:

- an intestate share;
 - an elective share;
 - an omitted spouse's or child's share;
 - a homestead allowance;
 - exempt property; and
 - a family allowance.
- Any revocable disposition or appointment of property to the killer.
 - Any power of appointment conferred on the killer by the testator.
 - Any nomination of the killer to serve in any fiduciary capacity on behalf of the testator.
 - Any jointly held interests, such as joint tenancy with rights of survivorship, which are reduced to tenants in common ownership interests.
 - Any right of the killer to either:
 - bring a wrongful death lawsuit related to the decedent's death; or
 - receive any proceeds from a wrongful death lawsuit related to the decedent's death.

(T.C.A. § 31-1-106(b), (c).)

Simultaneous Death

Tennessee deems:

- An individual failing to survive a decedent by 120 hours to have predeceased the decedent for purposes of:
 - the homestead allowance;
 - a year's support allowance;
 - exempt property;
 - elective share; and
 - intestate succession.
- A devisee failing to survive the testator by 120 hours to have predeceased the testator unless the testator's will provides otherwise.
- An heir or devisee as failing to survive the decedent for 120 hours if that survival is not established by clear and convincing evidence.

(T. C. A. § 31-3-108; see Question 8: Disinheriting a Testator's Spouse and Question 16.) These rules do not apply if application of the rule results in property escheating to the state (T. C. A. § 31-3-108(c)).

Lost Wills

15. Please describe what happens if the original will is lost.

In Tennessee, failure to locate a testator's original will generally creates a rebuttable presumption that the testator revoked the will. However, a will proponent can prove a lost will, including a holographic will, if the proponent can establish:

- That the testator validly executed the will.
- Proof of the will's contents, which may be shown in a copy of the lost original.
- That the testator did not revoke the will during the testator's lifetime.
- The circumstances under which the original was lost or out of the control of the testator before the testator's death and cannot be found after a proper search.

(T.C.A. § 32-4-106; see *In re Estate of West*, 729 S.W.2d 676, 678 (Tenn. Ct. App. 1987).)

Rules of Intestacy

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

In Tennessee, a decedent's estate assets (after payment of estate debts and charges) are distributed under Tennessee's laws of intestate succession if either:

- There is no valid will.
- The will's terms distribute assets under the laws of intestacy.

- The will does not effectively dispose of all probate property.

(T. C. A. § 31-2-101.)

Under Tennessee's laws of intestate succession, if a decedent dies leaving:

- A surviving spouse and no surviving issue, all the intestate estate passes to the surviving spouse.
- A surviving spouse and issue:
 - the surviving spouse receives the greater of one-third of the entire intestate estate or a child's share of the entire intestate estate; and
 - the remaining balance of the intestate estate goes to the decedent's issue in equal shares if all are the same degree of kinship to the decedent or, if they are of unequal degree, the remote issue take by representation.
- No surviving spouse, the decedent's intestate estate passes to:
 - the decedent's issue in equal shares if all are the same degree of kinship to the decedent or, if they are of unequal degree, the remote issue take by representation;
 - the decedent's parent or parents equally if decedent does not have surviving issue;
 - the decedent's siblings and their issue by representation, if decedent does not have surviving issue or parents; and
 - the decedent's grandparents or their issue if decedent does not have surviving issue, parents, or siblings. One-half of the estate passes to the paternal grandparents if both survive, and one-half to the maternal grandparents, with issue of grandparents taking equally if all the same degree of kinship or by representation if they are of unequal degree.

(T.C.A. §§ 31-2-104 and 31-2-106.) If there is no person to take the decedent's estate assets under Tennessee's intestate laws, the estate escheats to the state (T.C.A. § 31-2-109).

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