How to Sign a Will if Testator Has No Ability to Hold a Pen

Hello Firm!

42 years as an attorney, and I still haven't seen everything! :-)

Testator is in a nursing home. She has no motor skills, so she can't hold a pen in her hands, feet, or mouth to sign a the document. She IS lucid and able to understand what is happening around her. She is able to read and can communicate by indicating her preferences by learning toward "Yes"and "No" cards (and other cards with appropriate words on them).

I know the Florida statute provides

1. The testator must sign the will at the end; or 2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.

But what is the proper manner. Should the "other person" guide the testator's hand to sign the document, or simply sign the Testator's name to the document?

And should I indicate in the language of the Will that the "will was subscribed by JOHN DOE in the testator's presence and by the testator's direction?

Anything different for the Power of Attorney, Health Care Surrogate, Living Will and Pre-Need Guardian Designation?

BTW....I *will* be making a video of the signing to have visual evidence that she was lucid and aware of what was happening, and to show her assent and direction to the other person signing the will (and other estate planning documents) on her behalf.

I will look forward to your input on this matter.

This may be covered under the rules for notarizing a document that cannot be physically signed by the person. You might start there. In Texas, a book comes with the notary commission that covers how to notarize all sorts of things. There is a section in the book on how to notarize a person's signature

who cannot sign. I can't recall why I was looking at that section, but I didn't have to use it after all--it turned out the person could sign. Maybe FL also has an instructional book sent to all notaries.

Carla Peevey

I have no opinion on the amanuensis as I'm not in FL, but in my opinion you should double check the statute and see if it allows a "mark." Many people can make a "mark" even if it is not legibly their name and even if you have to tape a pen to their hand to help.

Erik Hammarlund, Massachusetts

Good of you to ask before proceeding. Of course, the answer is Sunshine state specific. Here, being unable to physically sign is not an issue. I had a client who could not write or speak. We communicated by her squeezing my assistant's hand. I read the entirety of each document to her. She even stopped me at one point to clarify something for her. We require two witnesses. I had a third person present to act for her. Here is the language I used in my self-proving affidavit and notary block.

We, CLIENT, the Testatrix, _____ and _____, the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testatrix directed another to sign and execute the instrument as her last Will after it was read aloud to her in its entirety, that it was executed as her free and voluntary act for the purposes therein expressed; and that each of the witnesses in the presence and hearing of the Testatrix, signed the Will as witness and that to the best of our knowledge the Testatrix was at that time eighteen (18) or more years of age, of sound mind and under no constraint or undue influence.

Subscribed, sworn, and acknowledged before me by CLIENT, the Testatrix, who directed that _____ sign on her behalf, and subscribed and sworn before me by _____ and _____ , witnesses, this xx day of xx, 20xx.

Notary Public

Now on that videotaping. Remember that everything will be recorded. I do not record. Sophisticated clients who fully understand documents and planning will hiccup when asked about documents they are about to sign.

Thus, I do not record.

Deb Matthews, Virginia

From the post it looks like Florida has a statute similar to the Texas one at Texas Estates Code 251.051, which, inter alia, permits someone to sign for the testator if testator is present and is under testator's direction and it is attested to by two or more credible witnesses who are at least age 14. From the post it appears Florida is the similar except looks like the witness age must be 18.

Nothing saying she cannot use more than two witnesses. My guess is the facility staffers are reluctant to serve as witnesses and your state law may discourage that. If I were handling this I would try for more than two witnesses.

From reading the Florida post I think it means they do as stated by Deborah Matthews, debomatt@GMAIL.COM.

Does this testator know of people who may challenge or contest her will? Counsel may want to document discussion about this, or may not want to .document . . . .

Rob Robertson

Yes. Just like you thought it should go.

Robert "Robby" W. Hughes, Jr., Georgia

Amanuensis. Good one. Had to look that up.

Amy A. Breyer, California

I'm addressing a couple of points raised by others in response.

First, Florida does allow signature by mark; provided it was intended to be a signature on a will; so if she can make a mark, even with her normally non writing hand, that is sufficient.

In re Estate of Williams, 182 So. 2d 10 (Fla. 1965)

Which may shed a bit of light on your questions of having someone else sign it:

We have not ignored respondent's contention that public policy, which is to protect testators and their heirs from fraud, would be best served by refusing to accept as properly executed under the statute a will signed by the testator with only [**6] his mark. In support of this contention respondents argue that it is impossible for handwriting experts to determine the authenticity of a mark as might be done with a handwritten alphabetical name. They also argue that if a testator cannot write his name and is not permitted to sign by mark, he will be forced to have another person subscribe his name for him. This they say will be added protection because a person requested to sign the name of another will not be likely to do so without first determining the identity of the purported testator.

It is true that even a handwriting expert would have difficulty determining who made a mark in the absence of distinguishing [*13] characteristics by which certain comparisons can reasonably be made. If proof of the execution of a will rested entirely upon the identification of the mark or signature of the testator the respondents' argument would be difficult to overcome. But such is not the case. The greatest protection against fraud, and the greatest aid in proof that a testator did in any manner sign his will as his, is furnished by the statutory requirement that it be done in the presence of, or acknowledged in the presence [**7] of, at least two attesting witnesses.

Furthermore, the alternative method for the execution of a will, by which some other person may subscribe the testator's name, really seems to offer even less protection than the testator's mark.

This is so because the statute does not require the person signing for the testator to be identified in the document. True, a careful lawyer supervising the execution of a will would see that such person's identity was reflected in

some manner at the end of the will. Nevertheless, the statute does not require it nor does it prescribe how it shall be made known that the testator's name was subscribed by another or how such person is to be identified in the document.

But, c.f. Bitetzakis v. Bitetzakis, 264 So. 3d 297 (Fla. 2d DCA 2019) which, in a nutshell, held that where TX started to sign his name; signed his first name and then stopped signing, did not sign his name for the purposes of the statute but the court concedes it was very specific facts.

Now, as to your question, IF she can't sign her name at all nor make a mark, then see 117.05(14)

(14) A notary public must make reasonable accommodations to provide notarial services to persons with disabilities.

(a) A notary public may notarize the signature of a person who is blind after the notary public has read the entire instrument to that person.

(b) A notary public may notarize the signature of a person who signs with a mark if:

1. The document signing is witnessed by two disinterested persons; 2. The notary public prints the person’s first name at the beginning of the designated signature line and the person’s last name at the end of the designated signature line; and 3. The notary public prints the words “his (or her) mark” below the person’s signature mark.

(c) The following notarial certificates are sufficient for the purpose of notarizing for a person who signs with a mark:

1. For an oath or affirmation:

(First Name) (Last Name)

His (or Her) Mark

STATE OF FLORIDA

COUNTY OF

Sworn to and subscribed before me by means of ☐ physical presence or ☐ online notarization, this day of , (year) , by (name of person making statement) , who signed with a mark in the presence of these witnesses:

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

2. For an acknowledgment in an individual capacity:

(First Name) (Last Name)

His (or Her) Mark

STATE OF FLORIDA

COUNTY OF

The foregoing instrument was acknowledged before me by means of ☐ physical presence or ☐ online notarization, this day of , (year) , by (name of person acknowledging) , who signed with a mark in the presence of these witnesses:

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(d) A notary public may sign the name of a person whose signature is to be notarized when that person is physically unable to sign or make a signature mark on a document if:

1. The person with a disability directs the notary public to sign in his or her presence by verbal, written, or other means; 2. The document signing is witnessed by two disinterested persons; and 3. The notary public writes below the signature the following statement: “Signature affixed by notary, pursuant to s. 117.05(14), Florida Statutes,” and states the circumstances and

the means by which the notary public was directed to sign the notarial certificate.

The notary public must maintain the proof of direction and authorization to sign on behalf of the person with a disability for 10 years from the date of the notarial act.

(e) The following notarial certificates are sufficient for the purpose of notarizing for a person with a disability who directs the notary public to sign his or her name:

1. For an oath or affirmation:

STATE OF FLORIDA

COUNTY OF

Sworn to (or affirmed) before me by means of ☐ physical presence or ☐ online notarization, this day of , (year) , by (name of person making statement) , and subscribed by (name of notary) at the direction of (name of person making statement) by (written, verbal, or other means) , and in the presence of these witnesses:

(Signature of Notary Public - State of Florida) (Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

2. For an acknowledgment in an individual capacity:

STATE OF FLORIDA

COUNTY OF

The foregoing instrument was acknowledged before me by means of ☐ physical presence or ☐ online notarization, this day of , (year) , by (name of person acknowledging) and subscribed by (name of notary) at the direction of (name of person acknowledging) , and in the presence of these witnesses:

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public) Personally Known OR Produced Identification

Type of Identification Produced

So, the Notary is the one who signs the name.

Ronald A Jones, Florida