

PROBATE CORNER

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ARTICLE: Proper Attestation Of A Will

- A will must be signed by two attesting witnesses in the presence of the testator and in the presence of each other. *See* §732.502(1), Fla. Stat.; *Price v. Abate*, 9 So. 3d 37 (Fla. 5th DCA 2009) (the mere fact that the attesting witnesses were in the vicinity of one another at the time the testator signed the will was insufficient to satisfy the statutory requirement). The purpose of this statute is to assure not only that the signature on the will is that of the testator, but to provide reasonable assurance of the circumstances under which the signature was affixed to the document. *See* *Manson v. Hayes*, 539 So. 2d 27, 28 n.2 (Fla. 3d DCA 1989). There is little likelihood of fraud in the execution when all parties sit at the same table and affix their signatures in the presence of each other.
- Any person “competent to be a witness” may act as a witness to a will. *See* §732.504, Fla. Stat. Competency is determined at the time of the execution of the will and not at the time the will is offered for probate. *Cf.* §733.201(3), Fla. Stat. A witness is presumed competent to testify until the contrary is established. *See* §90.601, Fla. Stat.; *Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000); *Hawk v. State*, 718 So. 2d 159 (Fla. 1998). A witness is incompetent to testify if the Court determines the witness is (1) unable to communicate to the Court; (2) unable to understand the duty to tell the truth; or (3) unable to perceive and remember the events. *See* *Rutherford, Supra*; *citing* §§ 90.603, 90.604, Fla. Stat..
- The witness is not required to make any determination regarding the testator's capacity, the voluntariness of his act, or whether the instrument being signed is, in fact, his will. *See* *In re Estate of Beaks*, 306 So. 2d 99 (Fla. 1975); *York v. Smith*, 385 So. 2d 1110 (Fla. 1st DCA 1980); *In re Estate of Wognum*, 279 So. 2d 66 (Fla. 4th DCA 1973). *But see* §732.503 Self-proof of will (the witnesses must sign an oath that the testator declared the instrument to be his will).
- The attestation of a witness is not barred because he has an interest under the will. *See* §732.504(2), Fla. Stat.
- Witnesses do not have to sign the will at any particular place on the Will. *See* *In re Estate of Charry*, 359 So. 2d 544 (Fla. 4th DCA 1978).
- The order in which the signing occurs makes no difference. *See* *Bain v. Hill*, 639 So. 2d 178 (Fla. 4th DCA 1994).
- It is not advisable for the attorney to act as a witness. If there is a will contest, the attorney will be a witness and therefore, disqualified from acting as litigation counsel (as opposed to administration counsel) in the will contest. *See* *Larkin v. Pirthauer*, 700 So. 2d 182 (Fla. 4th DCA 1997); *Eccles v. Nelson*, 919 So. 2d 658 (Fla. 5th DCA 2006).
- A testator must strictly comply with these statutory requirements in order to create a valid will. *See* *Allen v. Dalk*, 826 So. 2d 245 (Fla. 2002), *citing* *In re Bancker's Estate*, 232 So. 2d 431 (Fla. 4th DCA 1970).