GOOD ESTATE PLANNING PROCESS: A PANACEA FOR LITIGATION

by R. Kevin Spencer[*]

I. INTRODUCTION

Every estate litigator must contend with an estate planner, but not every estate planner must contend with an estate litigator.[1] Most doctors, if they practice long enough, assume they will get sued at some point, i.e., their work product will be questioned or challenged.[2] While estate planners cannot be sued by a beneficiary in Texas for their estate planning work due to lack of privity,[3] most estate planners believe their work product will someday be

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1. *See generally* Gerry W. Beyer, TEXAS WILLS, TRUSTS, AND ESTATES 257 (2018) (discussing the potential for will contests to exist).

2. Donovan Weger, *Going Bare—Are Doctors Required to Have Malpractice Insurance?*, GALLAGHER (Mar. 20, 2017), https://www.gallaghermalpractice.com/blog/post/going-bare-are-doctors-required-to-have-malpractice-insurance [perma.cc/7FVK-KPMG].

3. Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996).

contested;[4] but it does not have to happen.[5] The job of an estate litigator is to search for evidence proving the invalidity of a Will,[6] based upon lack of testamentary capacity and undue influence.[7] A failure of formalities and solemnities[8] or "forgery or other fraud" are additional grounds for invalidity.[9] Unlike fire inspectors, who must search for the origin of a fire, estate litigators know a Will originates with the scrivener.[10] This article reveals some of the secrets of estate litigators and suggests the diligence needed for estate planners to avoid them, such as the importance of documenting their work, and preparing to defend their work product.[11] The quality of the process determines quality of the product; a Will contest necessarily includes attacking the process.[12] Much to the chagrin of estate litigators, this article arms estate planners with information and knowledge to avoid that attack.[13] Some of the information may seem elementary to good estate planners, but, unfortunately, these errors occur time and time again.[14] The development of a quality estate planning process will improve the product for the client and help to avoid scrutiny of the estate planner's work product in a Will contest.[15]

II. THE SCRIVENER AND THE PROCESS

The assumption in any Will contest is that a Will is invalid due to the testator's poor health, weakened condition, or because someone intervened and pressured the testator to sign a document he or she would not have otherwise signed.[16] The initial inquiry is to determine how the Will came to exist and to examine the estate planner's process.[17] Because it is the natural

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4. *Id.* (*Barcelo* protects estate planners from being sued for substantive Will invalidity, but testator's estate owns a claim against estate planning attorney for negligent tax planning.); *see* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006).

5. TEX. EST. CODE ANN. § 256.204 (Supp.); *see generally* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 47:1 (4th ed. 2018) (listing the numerous grounds in which a will may be contested).

6. The term "Will" when used to describe a Last Will & Testament is capitalized to differentiate it as a formal document versus the normal use of the term "will," such as in context, "I will. . .". This is helpful in practice as well.

7. *See* 9 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 16:2 (4th ed. 2018).

8. TEX. EST. CODE ANN. § 251.051 (Supp.).

9. TEX. EST. CODE ANN. § 256.204 (Supp.); *see* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 51:32 (4th ed. 2018).

10. *See, e.g.*, Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: the Argument for Reformation*, 40 CATH. U. L. REV. 1 (1990); The term "scrivener" (discussed below) means the "scrivener attorney" which means the "estate planner", i.e., the estate planning attorney; each of these terms will be used interchangeably.

11. *See infra* Part II.

12. *See infra* Section II.B.

13. *See infra* Part II.

14. *See infra* Part II.

15. *See infra* Part II.

16. *See* Gerry W. Beyer, TEXAS WILLS, TRUSTS, AND ESTATES 231–47 (2018).

17. *See Construction of Wills*, 12 TEX. FORMS LEGAL & BUS. § 24:88 (Aug. 2018).

starting point, the estate litigator's first subpoena in a Will contest is to the scrivener seeking turnover of his or her file[18] because it illuminates the process.[19] Next, discovery is directed at determining the testator's physical and mental condition.[20] Care should be taken to inquire about a testator's abilities if there is any reason to suspect a problem.[21] Ignoring obvious signs and finding out the testator's condition later can put a scrivener in the precarious position of trying to explain why he or she re-directed the testator's estate when the testator lacked capacity.[22] The scrivener should also take every precaution to ascertain the testator is not being unduly influenced. Every estate planner and scrivener should develop a process to guarantee compliance with all the formal requirements to make a Will in Texas, for determining and documenting the testator's ability to exercise good judgment, the ability to make decisions about his or her property, and to ensure the information communicated is from the testator alone and not from an undue influencer, directly or indirectly.[23]

A. The Scrivener

The "scrivener" or "scrivener attorney" is the estate planning attorney, who has a job as important as any other in the law.[24] Often, non-lawyers believe the area of estate planning is amenable to self-help and that they do not need to hire a lawyer to prepare a Will; in one sense, that belief is correct because, indeed, holographic Wills are valid.[25] Of course, a testator can purchase their own "store-bought" or online Will form and, if they prepare and execute it in compliance with all the requirements of section 251.051 of the Texas Estates Code, it would be valid.[26] But, if someone besides the testator prepares the Will, he or she is must have a law degree.[27] Preparing

18. TEX. R. EVID. 503(d)(2) (The attorney-client "privilege does not apply [i]f the communication is relevant to an issue between parties claiming through the same deceased client.").

19. *See* Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: the Argument for Reformation*, 40 CATH. U. L. REV. 1 (1990); Eunice L. Ross & Thomas J. Reed, *Testimony or Discovery During Lifetime of Testator*, WILL CONTESTS § 14:25 (2d ed. 2018).

20. *See Discovery*, O'CONNOR'S TEXAS PROBATE LAW HANDBOOK CH. 11-A § 7 (2018).

21. *See* Beyer, *supra* note 5.

22. Robert N. Sacks, *Making Sure the Gift is Valid: Lack of Capacity and Undue Influence Considerations*, SACKS, GLAZIER, FRANKLIN & LODISE LLP 2002, at 6 [perma.cc/LKU-6AS5].

23. *See* TEX. EST. CODE ANN. ch. 251 (Supp.); *see also infra* Sections II.A–K.

24. *Scrivener*, BLACK'S LAW DICTIONARY (10th ed. 2014).

25. TEX. EST. CODE ANN. § 251.052 (Supp.); *see* 9 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 19:3 (4th ed. 2018).

26. TEX. EST. CODE ANN. § 251.051 (Supp.); *see also* Michelle Kaminsky, *Texas Last Will and Testament*, LEGALZOOM (Jan. 2015), https://www.legalzoom.com/articles/texas-last-will-and-testament [perma.cc/ GM6W-HELY] (discussing the benefits of creating your own will).

27. *See* TEX. GOV'T CODE ANN. § 81.101(a) (Supp.).

a Will without a law license is considered the unauthorized practice of law.[28] The *Palmer* Court explains, as follows:

> Drafting and supervising the execution of wills is, we believe, practicing law. By a will legal rights are secured. In giving instructions, confidential communications regarding family relations are often necessary. There is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc. These duties cannot be performed by an unlicensed person, not an attorney, and who is untrained in such complex legal subjects.[29]

It is common in Will contests to find non-lawyers "helping" or "assisting" an elderly testator with Will preparation and execution, usually in his or her favor; the unauthorized practice of law is often lost in the shuffle and rarely, if ever, prosecuted.[30] Many attorneys assume estate planning is a simple area of the law—a quick and easy way to make a buck and one that does not require much training; the latter could not be further from the truth, as the *Palmer* case indicates.[31] Drafting a Will and estate plan affects property rights for all time.[32] Lawyers who take estate planning lightly are doomed to be the target of an estate litigator's cross-examination.[33] The only way to avoid that uncomfortable experience is to develop a solid process.[34]

B. The Strength and Consistency of Your Process Will Dictate the Excellence of Your Product: What Is the Process?

There is nothing more important in an estate planners' practice than their process.[35] The estate planning process is a series of standardized procedures designed to accurately translate the testator's testamentary expressed desires for their property onto paper, to ensure compliance with all the requirements of Texas law to make the Will valid, to protect the client from overreaching, and to equip the estate planner or scrivener with information to defend his or

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28. Palmer v. Unauthorized Prac. Comm'n of St. B., 438 S.W.2d 374, 376 (Tex. App.—Houston [14th Dist.] 1969, no writ); *see* MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2018).

29. *Palmer*, 438 S.W.2d at 376 (emphasis added).

30. Mary Randolph, *Making a Will: Are Lawyers Optional?*, NOLO (Oct. 30, 2018, 3:27 PM), https://www.nolo.com/legal-encyclopedia/making-will-are-lawyers-optional-29812.html [perma.cc/AG8P-TV3W].

31. *See Palmer*, 438 S.W.2d at 376.

32. *See* 9 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 1.1 (4th ed. 2018).

33. *See* Ronald R. Cresswell et al., *Claims Related to Estate Planning*, 1 TEX. PRAC. GUIDE WILLS, TRUSTS AND EST. PLAN. § 1:91 (July 2018).

34. Garber, *infra* note 38.

35. *Id.*

her work product—the estate plan.[36] The Process[37] requires setting up procedures and high standards that should be followed in an estate planning practice.[38] Once established, the Process should be implemented and followed consistently and habitually.[39] It makes no sense to establish procedures and then ignore them. Ignoring established procedures elicits new questions on cross-examination about why an estate planner deviated from established procedures in a particular case.[40] Consistency is critical because it demands diligence from the estate planner and solidifies good practice. The property and circumstances of every client are different, but the Process remains the same and applies to all clients.[41] The Process cannot be so rigid that the scrivener cannot adapt to the desires, property, or plan of each client, but the fundamental tenets of the Process should remain, so consistency and habits can be relied upon years, even decades later, if needed.[42] For instance, years later when the scrivener cannot remember the exact circumstances of a Will execution, if called upon to do so, he or she can be confident in testifying the same Process was used back then and, therefore, everything was done correctly; plus a thorough file containing good notes bolsters that confidence and refreshes memory.[43] Different client desires and circumstances do not change the legal requirements to make a Will, so there is no reason to deviate too far from established Will execution procedures.[44] Circumstances or complexity may dictate the number of meetings needed with a particular client, but how thoroughly those meetings are documented and the detail required to establish an understanding of the client's desires should be as consistent as possible.[45] Establish a consistent process for making each estate planning client as important as the next and institute rituals for making the Will execution ceremony just that—a ceremony.[46] Formality in the process

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36. *Id.*

37. The term "Process" as used herein shall be capitalized as a defined term and shall reference the latter definition.

38. *See generally* Julie Garber, *Learn the Steps to Creating a Good Estate Plan*, THE BALANCE (Oct. 16, 2018), https://www.thebalance.com/creating-good-estate-plan-3505162 [perma.cc/ETM7-BFSY] (demonstrating what a successful estate planning process might look like).

39. *See generally* Michael Wilkinson, *Why You Need a Plan: 5 Good Reasons*, MGMT. HELP (Oct. 18, 2011), https://managementhelp.org/blogs/strategic-planning/2011/10/18/why-you-need-a-plan-5-good-reasons/ [perma.cc/952U-AQ2D] (stating that some of the benefits to a plan are to get the parties in the same direction and to enhance communication).

40. *Id.*

41. *Id.*

42. *See* John O. Brentin, *Evolving Strategies for a Changing Estate Planning Practice*, ASPATORE, 2008 WL 5689252 at *1 (2008).

43. *Id.* at *8–9.

44. *See generally id.* (stating that some of the plan will be consistent between clients, but a practitioner should tailor client objectives to the plan).

45. *Id.* at *2–3.

46. *See* Gerry W. Beyer, *The Will Execution Ceremony*, GERRY W. BEYER, http://www.professorbeyer.com/Archive/new_site/Articles/Will_Ceremony.html [perma.cc/6X6D-ZJGH] (last visited Nov. 29, 2018).

forces everyone involved to pay attention, to follow and diligently perform in meeting the requirements of Texas law, so it cannot be questioned later.[47]

Each estate planner should establish a Process, which he or she believes allows for the best, most thorough representation of the client.[48] In developing an estate planning Process, the estate planner should consider the following questions: Do you do enough—in every case—to make sure you understand the testator's desires?[49] Do you make and keep notes about your client's desires?[50] Do you ensure the desires communicated by the testator are his or her desires and not those of someone else?[51] Do you take steps to eliminate, as much as possible, the opportunity for someone to unduly influence the testator at the time of the execution?[52] If these questions cannot be answered affirmatively, the Process is broken.[53] Good Process requires meticulous adherence to the requirements of the law and to never cut corners, which includes documenting the process well enough to respond to inquiries about it.[54] Establishing a Process separates a good estate planner from a bad one and a good Process can become a trademark for the estate planner—the "it" factor that differentiates him or her from the competition.[55] The Process informs the scrivener's testimony and corroborates good practice techniques.[56] The Process, or lack thereof, can make or break a scrivener's credibility.[57] There is an old British military adage known as the "7Ps" applicable here: "Prior Proper Planning Prevents Piss Poor Performance." Good Process is the prior proper planning that prevents the scrivener from poorly performing his or her duties to the client.[58]

C. Busy Practices and Many Clients Prevents Remembering Everything—Take & Keep Notes, Else Spoliation Instruction

In the moment, we all believe we can later remember statements and events.[59] However, if we are honest about it, with busy law practices, so many clients, so many facts, and so much information to store, it is simply

47. *See id.*
48. *See* Brentin, *supra* note 43, at *4.
49. *Id.* at *1–2.
50. *Id.*
51. *Id.*
52. *Id.*
53. *See* Wilkinson, *supra* note 39.
54. *See* Brentin, *supra* note 42.
55. Julie Garber, *What to Look for in an Estate Planning Lawyer*, THE BALANCE, https://www.thebalance.com/what-is-an-estate-planning-attorney-3505707 [perma.cc/5A5X-KHUG] (last visited Oct. 30, 2018).
56. *See id.*
57. *See id.*
58. *See* Brentin, *supra* note 42, at *11.
59. *See generally* Mu-ming Poo et al., *What Is Memory? The Present State of the Engram*, 14 BMC BIO. 40 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4874022/ [perma.cc/2X6J-Q9UE] (discussing the mechanics of memory).

not possible to remember everything that happened during an event days, months, or years later.[60] It is certainly not possible to remember specific details, such as the content of conversations or questions asked; so, it is important to adequately document the desires of a testator or the events of a Will execution in writing.[61] Video and audio recordings can also be utilized to document the event, but should be done sparingly and cautiously if there is even a question of the testator's capacity or undue influence.[62] Video or audio recordings are usually a sign of concern about something in the Process. Questions arise, instantly, about why the Will execution was recorded because there is no good reason to do so when a testator is in good health and nothing dubious is happening. Will contests are typically based on circumstantial evidence, and video and audio recordings provide direct evidence of lack of capacity or undue influence if the testator does not perform well.[63] It is rare when a video helps the proponent of a suspect Will.

It cannot be stressed enough how important it is for the scrivener attorney to take notes throughout the planning process.[64] The goal of the scrivener when taking notes is not to write down every detail, but to have enough detail that the notes could serve as an outline for writing a short story about the client's situation and testamentary desires, if called upon to do so.[65] But, the scrivener should understand the client's entire file is subject to being produced in a Will contest, based upon the exception in which the attorney-client "privilege does not apply . . . if the communication is relevant to an issue between parties claiming through the same deceased client."[66] Relevance is a low standard.[67] Rule 401 of the Texas Rules of Evidence provides, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[68] It is difficult to imagine that there could be anything in the scrivener's file, created at or near the time of the Will preparation process, that is not relevant.[69] The scrivener's file may contain transactions that occurred five, ten, or twenty years earlier and even those can be relevant. Even older, seemingly less relevant transactions can

60. *See* Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How to Prevent Them*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 61, 79–80 (2008).

61. *See id.*

62. Stephen C. Simpson, *Avoiding a Will Contest: Estate Planning & a Legislative Solution*, 37-AUG HOUS. LAW. 36, 38 (1999).

63. *See id.*

64. Megan Zavieh, *Keeping Better Notes*, ATT'Y AT WORK, https://www.attorneyatwork.com/keeping-better-notes/ [perma.cc/P3RL-WGG2] (last visited Oct. 29, 2018).

65. *Id.*

66. TEX. R. EVID. 503(d)(2).

67. *See* TEX. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

68. *Id.*

69. *See id.*

make a fact more or less probable in a Will contest because it can show course of dealing and history or consistency in the testator's thinking and in the plan.[70] Rule 503 is an evidence rule, so admissibility does not determine whether the scrivener's entire file is discoverable.[71] Relevance is not the standard for discovery.[72] If the scrivener's file is reasonably calculated to lead to the discovery of admissible evidence, and it is almost impossible to see how it would not be, then it should be produced.[73] Generally, the scrivener's entire file should be subject to production because it can reveal all sorts of information about the Process.[74] Rarely is production of the scrivener's file limited and it is never completely protected. The point is that the scrivener's file, either in its entirety or to some extent, is going to be turned over to the parties in a Will contest.[75]

Knowing the scrivener's file is subject to scrutiny and review by all parties to a Will contest, if the scrivener takes notes, as they should, then they should keep those notes.[76] It is common for a scrivener to testify he or she took notes, but it is not their regular practice to keep them, i.e., they discard them immediately.[77] This is a glaring defect in the scrivener's Process.[78] Some scriveners take notes and keep them, but then claim to destroy them as a matter of course after expiration of time or some event, which is a weak excuse now that everything can be scanned and preserved electronically in a matter of minutes.[79] Not having a file is bad enough, but having a file that is now missing, thrown away, gone, or destroyed is even worse.[80] The first thought is there was something in those notes the scrivener or the "bad-actor" did not want the Will contestant to see.[81] At best, the absence of notes,

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70. *See* Brentin, *supra* note 42, at *1 ("Planning is a lifelong process . . .").

71. *Compare* TEX. R. EVID. 503 (discoverable information has exceptions to admissibility), *with* TEX. R. CIV. P. 192.3(a) (the scope of discovery goes beyond admissible evidence).

72. TEX. R. CIV. P. 192.3(a).

73. *Id.* ("In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

74. *But see In re* Rittenmeyer, 558 S.W.3d 789, 789 (Tex. App.—Dallas 2018, no pet.) (holding the burden to establish application of the exception was not met, finding that parts of the scrivener's file were not "relevant to the issues at hand.").

75. *See* Joyce Moore, *Will Contests: From Start to Finish*, 44 ST. MARY'S L.J. 97, 180-83 (2012).

76. Vincent J. Russo & Marvin Rachlin, N.Y. ELDER L. § 3:14 (2018).

77. *Id.*

78. *Id.*

79. *See, e.g.*, Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 16–17 (Tex. 2014) (holding that spoliation, even if negligent, prejudices nonspoliating party, entitling that party to remedies).

80. *Id.*

81. *See, e.g.*, *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003) (failing to preserve information correctly may destroy a party's ability to bring claims or defenses).

whether completely or partially, casts doubt on the entire Process.[82] At worst, it seriously harms the credibility of the scrivener and may entitle the contestant to a spoliation instruction and its accompanying presumptions and inferences.[83] In *Trevino v. Ortega*, the Texas Supreme Court held spoliation is a remedy and sanction, and not a separate tort cause of action.[84] The Supreme Court then relates to the history of spoliation of evidence dating back to the 1850's and its application after *Trevino* in *Brookshire Brothers, Ltd. v. Aldridge*:

> The spoliation of evidence is a serious issue. A party's failure to reasonably preserve discoverable evidence may significantly hamper the nonspoliating party's ability to present its claims or defenses . . . and can "undermine the truth-seeking function of the judicial system and the adjudicatory process,"[85]

The court goes on:

> In declining to recognize spoliation as an independent tort in *Trevino*, we acknowledged that courts must have "adequate measures to ensure that it does not improperly impair a litigant's rights." Thus, when evidence is lost, altered, or destroyed, trial courts have the discretion to impose an appropriate remedy so that the parties are restored to a rough approximation of what their positions would have been were the evidence available. . . . Texas courts necessarily enjoy wide latitude in remedying acts of discovery abuse, including evidence spoliation. Neither the Texas Rules of Evidence nor the Texas Rules of Civil Procedure specifically address spoliation . . . However, this Court recognized the concept as early as 1852, when we adopted the principle that all things are presumed against the wrongdoer; this is known as the spoliation presumption.[86]

Rule 215.2 of the Texas Rules of Civil Procedure enumerates a wide array of remedies available to a trial court when a party has breached its duty to preserve evidence, all available when spoliation of evidence is determined by a court.[87] The *Brookshire* court states "the trial court also has discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case, including the submission of a spoliation instruction to the

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82. *See generally* Zubulake v. UBS Warburg L.L.C., 220 F.R.D. 212, 214 (S.D.N.Y. 2003) ("Documents create a paper reality we call proof. The absence of such documentary proof may stymie the search for the truth.").

83. *See Brookshire Bros.*, 438 S.W.3d at 16–17.

84. Trevino v. Ortega, 969 S.W.2d 950, 954 (Tex. 1998).

85. *See Brookshire Bros.*, 438 S.W.3d at 16–17 (citing Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) and Justice Rebecca Simmons & Michael J. Ritter, *Texas's Spoliation "Presumption"*, 43 ST. MARY'S L.J. 691, 701 (2002)).

86. *See Brookshire Bros.*, 438 S.W.3d at 18 (citing *Wal-Mart Stores*, 106 S.W.3d at 721).

87. TEX. R. CIV. P. 215.2; *see Brookshire Bros.*, 438 S.W.3d at 21.

jury."[88] Such an instruction can be devastating to the Will proponent's case, because with the instruction comes the ability to argue numerous inferences.[89] The contestant may argue reasonable inferences about why the scrivener's file is missing and what it would have revealed in the context of the case.[90] Stated another way, it allows an estate litigator to be as creative as possible about the destruction of evidence and the flaws in the estate planner's process.[91] Spoliation remedy is curative rather than punitive and is inherently a sanction.[92] It is among the harshest sanctions a trial court can impose to remedy spoliation and, depending on how it is applied, can function as a death penalty sanction.[93] On the other hand, destruction of evidence can skew a trial in favor of the bad actor and against the non-spoliating party.[94] Courts must weigh the effect of a spoliation instruction against the prejudice of destroyed evidence.[95] It follows that an instruction should address spoliation in certain circumstances, but should be used cautiously.[96] No scrivener wants to cause the damage a spoliation instruction can create or its effect on the case of a proponent of a Will in a Will contest; a good Process will always prevent this situation.[97]

D. Listening Is the Most Important Part of Preparing a Will

A Will is one of the most important documents a person will ever sign in his or her lifetime.[98] A Will speaks for the testator from the grave and should be an expression of his or her testamentary desires and not those of the estate planner.[99] To make sure the Will is accurate, the scrivener must be deferential to the client-testator and not take over the testator's intentions.[100] Having legal expertise does not give a scrivener license to alter or redirect the intent of the client.[101] The scrivener injecting themselves into the

88. *See Brookshire Bros.*, 438 S.W.3d at 21.

89. *See* U.S. v. Wise, 221 F.3d 140, 156 (S.D. Tex. 2000) ("A district court has discretion to admit evidence of spoliation and to instruct the jury on adverse inferences.").

90. *Brookshire Bros.*, 438 S.W.3d at 26.

91. *See id.*

92. *See id.* at 22 (citing *Wal-Mart Stores*, 106 S.W.3d at 721).

93. Zubulake v. UBS Warburg L.L.C., 220 F.R.D. 212, 214 (S.D.N.Y. 2003); Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 619 (S.D. Tex. 2010); Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 22–23 (Tex. 2014); *see* TransAmerican Nat. Gas Corp. v. Powell, 811 S.W.2d 913, 917–18 (Tex. 1991).

94. *See generally TransAmerican*, 811 S.W.2d at 917 (stating that sanctions by trial courts must be justified).

95. *Brookshire Bros.*, 438 S.W.3d at 22–23.

96. *Id.*

97. *See* Wilkinson, *supra* note 39.

98. *See generally* Beyer, *supra* note 42 (describing the importance of clients memorializing their wishes regarding their property at death).

99. *Id.*

100. *See* Gerry. W. Beyer, *Avoid Being a Defendant: Estate Planning Malpractice and Ethical Concerns*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 224, 235 (2015).

101. *See generally* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS §§ 53:1 and 53:11 (4th ed.

testator's desires is the worst mistake possible and can totally destroy the Process.[102] The scrivener should talk to and meet with the testator as many times as is necessary to be certain of the testator's desires.[103] Thorough discussions about the testator's intent help prevent the scrivener misinterpreting or incorrectly translating it into the Will.[104] Documenting the discussions can mitigate even the appearance of the scrivener drafting a Will he or she thinks the testator needs instead of one the testator actually wants. The latter is essential to preserve the integrity of the Will, i.e., that it represents the testator's true desires, particularly if there is an unnatural disposition or disinheritance.[105]

Indeed, listening is the most important part of the entire Process.[106] The task of putting those desires on to paper is secondary to determining the desires with certainty because a Will cannot be accurately drafted until the scrivener meticulously discerns the testator's intent.[107] The scrivener fails if the end result of the estate planning Process is a skewed or twisted version of the client's desires.[108] Nothing is worse for a scrivener defending his or her work product than to have to admit, under oath, the document prepared for the client does not comply with his or her notes and does not comport with the testator's expressed testamentary intent.[109] The client's testamentary intent[110] and the scrivener's notes should match up with the terms of the Will and when they do not, the estate planner will have to admit the Will does not accurately express the client-testator's testamentary intent.[111] The admission equates to saying neither the scrivener nor the testator was able to find the discrepancy and make or request a change. Whether it is the scrivener's fault for failing to properly input the testator's desires or the testator's fault for not catching the error does not matter because it taints the validity of the entire document. A timely-filed Will contest is easier when the Will does not accurately reflect the testator's intent and desires, which reduces the likelihood of the Will being found valid or being admitted to probate.[112]

2018) (discussing the liabilities an attorney may encounter for negligently drafting a will and negligent misrepresentation).

102. *See id.*

103. *See* Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 1, 15 (2011).

104. *See id.*

105. *See* Moore, *supra* note 75, at 104.

106. *See* Beyer, *supra* note 98.

107. *See id.*

108. *See* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 51:36 (4th ed. 2018).

109. *See id.*

110. *In re* Estate of Hendler, 316 S.W.3d 703, 707 (Tex. App.—Dallas 2010, no pet.) (citing Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955)) (Testamentary intent is the intent to create a revocable disposition of property that will take effect after death.).

111. *See id.*

112. *See* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 51:44 (4th ed. 2018); Estate of Hendler, at 707 (Tex. App.—Dallas 2010, no pet.) (citing Langehennig v. Hohmann, 163 S.W.2d 402, 405 (1942)); *In re* Estate of Brown, 507 S.W.2d 801, 803–05 (Tex. App.—Dallas 1974, writ ref'd n.r.e.)

Listening carefully and correctly translating the information into the Will is critical to the Process and the scrivener defending the Will.[113]

E. Be Prepared to Defend Disinheritance

For some people, even the thought of disinheriting a child—the natural object of their bounty—is unthinkable.[114] Executing a natural, or "normal," disposition Will to family along bloodlines is almost understood, so deviation is generally considered aberrational and causes instant suspicion.[115] Disinheritance raises many questions and jurors usually want to see a reasonable explanation for it.[116] The jury will turn to the proponent for an explanation of "why," and the proponent will invariably turn to the scrivener for that explanation, which is the reason the scrivener must be prepared to defend disinheritance.[117] If there is a good or reasonable excuse for disinheritance, jurors might agree that doing so is reasonable.[118] But, when there is no excuse or no good excuse, the Will's validity will be questioned.[119] What any particular jury might think is a good excuse for disinheritance is impossible to predict. The "mommy loved me more" or "that child got enough already" excuses generally do not work because no juror can measure the extent of a person's love for his or her child or how much in *inter vivos* gifts might be enough; for disinheritance a jury usually requires more.[120] Even though the burden does not actually shift, it is a situation when the proponent must have a good explanation for the disinheritance or the jury will question whether the entire Will was intended by the testator.[121] If weak excuses are the only way the proponent can justify the disinheritance, then there should be overwhelming evidence (in the scrivener's file) to support the excuses, or the case will not be credible.[122] Possible valid reasons to explain disinheritance are: (i) the testator and the child hated each other, had

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(If it is unclear from the language of an instrument whether its maker created it with testamentary intent, we may also consider evidence of the surrounding facts and circumstances.).

113. *See* Brentin, *supra* note 42, at *1 (explaining that the attorney's job is to listen to the client's goals and objectives in order to create an effective estate plan).

114. *See* Beyer, *supra* note 103.

115. *See id.*

116. *See id.*; *see also* 1 Gerry W. Beyer, 10 TEX. PRAC., TEXAS LAW OF WILLS § 52:2 (4th ed. 2018) (describing the outcomes of disinheriting family members).

117. *See id.*

118. *See* Beyer, *supra* note 103.

119. *See id.*

120. *See id.*; *see also* Melissa Street, *A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy*, 7 PEPP. DISP. RESOL. L.J. 141, 153 (2007) (stating that testators disinherit children for a multitude of reasons).

121. Ryan, *infra* note 122.

122. *See generally* Michael P. Ryan, *The Fine Art of Disinheritance: Drafting in Contemplation of Probate Contests*, CULLEN & DYKMAN LLP (Nov. 28, 2012), http://www.cullenanddykman.com/news-advisories-38.html [perma.cc/V3TL-34TZ] (discussing that explicitly stated reasons for disinheritance, supporting documentation, and prior wills provide evidence of disinheritance).

a falling out or were estranged, (ii) the child was convicted of a felony, such as murder or child molestation, (iii) the child is a drug addict and the inheritance would perpetuate the addiction, (iv) the child has threatened the parent with physical harm, or (v) one of them is a horrible person who prevents the pair from ever getting along and among others.[123]

Many scriveners believe their only obligation to their clients is to regurgitate their desires onto paper, which is negligent and short-sighted.[124] If the latter were true, then the attorney serves no role and the client could simply prepare it themselves or download a Will form online, fill in the blanks, and create a Will.[125] The goal is to accurately transfer the client's desires into the Will in the context of a good Process.[126] In preparing to defend disinheritance, the scrivener attorney must delve deeper into the history and family relationships of their clients to find out more about the motivation for the disinheritance.[127] The scrivener must be ready with good answers to questions about the disinheritance because "I do not know" or "I have no idea, but that is what she told me she wanted to do" will not convince a jury that the testator desired the disparate and unequal treatment of a child or children.[128]

Relationships are meaningful in most people's lives and a lack of relationship tells a lot about people or a family as well.[129] Scriveners should explore the relationships of the parties involved — find out the "story" — and document them as part of the process.[130] Even when no dissention or foreseeable contest exists, it is important to understand how your client views the members of his or her family.[131] A total lack of relationship can justify disinheritance and may be difficult to contend with when contesting a Will.[132] When a parent and child have no relationship, have not seen each other in years or even decades, did not talk on the phone or send letters, Christmas cards, birthday cards, e-mails or do anything that even resembled an actual relationship, it is very difficult to argue to a jury that the deceased parent intended to provide for that child and that the failure to do so is

123. Beyer, *supra* note 103; *see The Why and How to Disinherit a Child*, GOLDHIRSH ADVISORS, http://www.goldhirshadvisors.com/page/disinherit-a-child [perma.cc/78ZC-G759] (last visited Nov. 29, 2018).

124. *See id.*

125. *See* Lisa McElroy, *A Big Problem With Fill-in-the-Blank Wills*, AARP (Apr. 11, 2014), http://www.blog.aarp.org/2014/04/11/the-big-problem-with-fill-in-the-blank-wills/ [perma.cc/WBV4-CU64].

126. Brentin, *supra* note 42, at *1–2.

127. *Id.*

128. *Id.*

129. Ryan, *supra* note 122.

130. Brentin, *supra* note 42, at *1–2.

131. *Id.*

132. *Id.*

aberrational.[133] Usually, the argument is there was a loving relationship and it makes no sense for the testator to have excluded a child; however, when no relationship exists, disinheritance can be logical.[134] A Will that makes no sense based upon the relationship or lack thereof or other circumstances preponderates against validity.[135] The scrivener's Process should include gathering such information and documenting it.[136] Without a good explanation, the fairness analysis that every jury will make preponderates in favor of the contestant.[137] The scrivener should be the one to convey the "why" about the disinheritance.[138] It is not only embarrassing to a scrivener who cannot remember or explain it, but it does a disservice to the client, because his or her desires depend on how well the scrivener can support them.[139]

F. Testing Capacity and Protecting Against Undue Influence

There can be no doubt that a scrivener attorney has a fiduciary obligation to his estate planning client.[140] Within that fiduciary obligation is the duty to test and ascertain the testator's capacity and to protect that client from undue influence.[141]

1. Testamentary Capacity

Routinely, testamentary capacity may not be an issue and no alerts or "red-flags" arise causing the scrivener to even make an inquiry about the capacity of a client.[142] However, the older or more infirm the client is, the more diligent a scrivener must be in making sure the client is of sound mind —meaning, that he or she has testamentary capacity.[143] In those cases in which there is even an inkling that the testator might lack capacity or that his or her capacity might be suspect, a scrivener should take extra steps to satisfy himself or herself that the client is of sound mind.[144] Sometimes the latter involves the scrivener asking simple questions, like who the President is or

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133. *See* Scott T. Jarboe, *Interpreting a Testator's Intent From the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L. Q. 1365, 1373–80 (2002).

134. *Id.*

135. *Id.*

136. Brentin, *supra* note 42, at *3–4.

137. *See id.*

138. *Id.*

139. *Id.*

140. *See generally* Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964) (holding that attorneys have fiduciary obligations to clients).

141. *See* Beyer, *supra* note 103, at *16.

142. *Id.*

143. *See id.*

144. *See id.*

to verify the day of the week.[145] Other times, it may require the attorney to refer the client to a doctor or psychiatrist to perform a mental status exam before signing a Will.[146] A scrivener should not be manipulated into making changes to a testamentary plan for someone that cannot understand it.[147] A scrivener who sees signs of incapacity, and does nothing, commits malpractice by changing the client's estate plan at a time when he or she lacked capacity to do so; the attorney is retained to protect against that very result.[148] In that instance, the scrivener is protected from suit by potential beneficiaries under *Barcelo v. Elliot*, but it is malpractice nevertheless. As noted above, *Barcelo* does not protect the scrivener from suits by the personal representative of an estate if the malpractice causes harm to the testator's estate post-death, so procuring the execution of a suspect Will can be a very serious issue.[149]

2. Protect Against Undue Influence

Just as an attorney has an obligation to make sure his or her client has testamentary capacity, he or she must also ensure the client is not susceptible or subject to undue influence; again, there is no reason to involve an attorney, if the attorney is not going to protect the client from overreaching.[150] To protect against undue influence, particularly, if the client may be susceptible to it due to a health problem, medication, head injury, psychosis or other malady, the first rule is to talk to and meet with the client alone.[151] The scrivener must take notice of each client's situation.[152] The scrivener should take notice of who is calling to set up appointments, whether the person that stands to gain from the Will is conveying information or messages about what should be in it, and whether the testator is unable to drive, is driven to meetings by the person that stands to gain the most, is frightened, has been threatened, is being denied access to children or pressured in some other

145. *See Assessing Legal Capacity, Legal Capacity—A Legal Determination*, SENIORS FIRST BC, http://seniorsfirstbc.ca/for-professionals/assessing-legal-capacity/ [perma.cc/E48M-2F68] (last visited Oct. 29, 2018).

146. *Id.*

147. *Id.*

148. *See* Wes Fitzwater, *Legal Incapacity: Working with a Questionably Competent Client*, FITZWATER MEYER HOLLIS & MARMION LLP (Feb. 2015), https://pmar.org/wp-content/uploads/2015/02/Legal-Incapacity-Working-with-a-Questionably-Competent-Client.pdf [perma.cc/UQH2-9N6U] (discussing the important roles in distinguishing capacity in a questionably competent client).

149. Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996); Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782–83 (Tex. 2006).

150. *See* Simpson, *supra* note 62.

151. *See, e.g.*, *In re* Estate of Blakes, 104 S.W.3d 333, 335 (Tex. App.—Dallas 2003, no pet.) (affirming a jury finding that Blake lacked testamentary capacity and was subject to undue influence when his friend drafted and presented his Will while he was in the hospital and in a deteriorating condition).

152. *See* Thomas M. Dixon et al., *Confronting Undue Influence in Your Practice?*, COMM. REP.: ELDER CARE 1, 2 (July 2015) https://www.clarkhill.com/uploads/medium/resource/1257/Klein layout.pdf [perma.cc/C9XQ-L4MR].

way.[153] If the attorney allows the client to be overreached by a stronger personality and made, in some way, to sign a Will that he or she might not otherwise have signed but for that pressure, the attorney has committed malpractice.[154] The testator hires the attorney to assure his or her desires are memorialized without input or interference from someone else, who stands to benefit by their input.[155] In the Process, the scrivener should make the effort to determine the client's capacity, whether she or he is susceptible to undue influence, or whether undue influence is occurring to avoid a Will from being set aside as invalid.[156]

G. The Execution—Performing the Will Execution

As part of the Process, the scrivener must recognize the importance of the Will execution ceremony.[157] Many lawyers minimize the Will execution because they have done it so many times, it is routine and needs no special attention, which is wholly incorrect.[158] A failure of the formalities and solemnities makes for a very simple Will contest because if the Will does not meet the basic requirements to make it a testamentary instrument under the law, it fails and testamentary capacity and undue influence become moot.[159] Signing a Will is more than the testator signing a document in the presence of two witnesses.[160] A simple contract does not require two witnesses to be present when the parties sign and neither does a trust.[161] If the Will execution is not important enough to take the time to follow good procedure and perform it correctly, then neither is the client, the fee received, nor the scrivener's law license.[162] There is something special about a Will, and the scrivener must take the Will seriously and use the Process to make it special.[163] It is important that scriveners make every Will execution ceremony a "big deal" and establish procedures in their Process to assure the execution is as important as the planning itself, such as checklists and

153. *See* Fitzwater, *supra* note 175.

154. *Id.*

155. *Id.*

156. *Id.*

157. Beyer, *supra* note 103; *see* Dillon Norton, *Wills Gone Wild! Drafting with Probate in Mind: Errors, Omissions, Natural Disasters, and How to Deal with Them*, 8 HOUS. L. REV. 79, 83–84 (2018).

158. Beyer, *supra* note 103.

159. *See In re* Estate of Romo, 503 S.W.3d 672, 677 (Tex. App.—El Paso 2016, no pet.).

160. *See* TEX. EST. CODE ANN. § 251.051 (Supp.); *see also In re* Estate of Romo, 503 S.W.3d at 677 (holding that raising the issue of lack of capacity did not preclude court from invalidating will for failing to meet statutory requirements).

161. *See* J. Hirby, *Who Can Witness a Legal Document?*, THE LAW DICTIONARY, https://thelaw dictionary.org/article/who-can-witness-a-legal-document/ [perma.cc/L3R5-A223] (last visited Nov. 5, 2018); *see also Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014).

162. *See* Palmer v. Unauthorized Prac. Comm'n of St. B., 438 S.W.2d 374, 376 (Tex. App.—Houston [14th Dist.] 1969, no writ) ("These duties cannot be performed by an unlicensed person, not an attorney, and who is untrained in such complex legal subjects.").

163. Beyer, *supra* note 103.

scripts.[164] The Will and the self-proving affidavit are separate documents, so, separating the Will execution ceremony from the self-proving affidavit procedure is also an important part of the Process.[165] Best practice dictates the scrivener being present at the Will execution to ensure the Process and Will execution ceremony requirements are correctly done—experience is irreplaceable in this context and direct knowledge is invaluable when testifying in support of it.

H. Annual Reviews and Document History

Just as important as exploring relationships is important, it is equally important to document them because, like a doctor, it establishes a history with long-term clients.[166] Relationships and circumstances change over time and having a good history in the file will bolster testimony in support of the estate plan.[167] Following the Will execution, good Process involves and should include having regular (annual or semi-annual) meetings with the client to confirm everything is and continues to be as desired.[168] A phone call is better than nothing, if only to confirm everything is in line with prior relationships, circumstances and desires, and that nothing has changed.[169]

Making sure the client's property, relationships, and situation are the same or similar as they were at the time of the plan and that there have been no large property changes (windfalls or losses) or estrangements justifying a new plan is all very important to establish historic consistency.[170] It not only helps sustain the estate planner's business, but it also is indicative of a great Process: a scrivener who cares about the client and ensures that the client's affairs are in order and up-to-date.[171] Likewise, the client should be happy to have an annual follow-up, like an annual physical with the doctor, to confirm the estate plan still complies with their desires and with current law.[172] Most clients do not know or keep up with changing transfer tax law, so these reviews allow an estate planner to inform the client about such changes.[173] The best part of the annual review, if nothing else, is that the client's file gets updated and, again, documents the client's history.[174] A long history of consistent testamentary desires during a time when the testator

164. *Id.*
165. *See* TEX. FAM. CODE ANN. § 251.104(c) (Supp.) (stating that the self-proving affidavit is a separate document "attached or annexed" to the Will).
166. *See* Brentin, *supra* note 42, at *8–9.
167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.*
171. *See id.*
172. *See id.*
173. *See id.*
174. *See id.*

unquestionably had capacity is one of the most difficult facts to contend with in a Will contest.[175] It is very difficult to argue a Will is aberrational and does not reflect the testator's desires when there are multiple estate plans or historical notes confirming consistent desires over a long period.[176] It would be very difficult to argue invalidity of a Will and to contend with a scrivener that can testify not only that the Will is in accordance with the testator's desires, but also that he confirmed it on three, five, seven or ten or more different occasions over fifteen years through meetings or phone conversations supported by notes, memos, or additional testamentary instruments.[177] A well-documented file of consistent desires over a long period of time deters Will contests far better than a "no contest" provision.[178]

I. Avoid Mistakes in the Will

Everyone makes mistakes, but we as lawyers are not supposed to and keeping them to a minimum is what separates bad lawyers from good lawyers and good lawyers from great lawyers.[179] Clients are not required to fully understand how a Will technically works, but they should be able to understand it generally, and understand the scrivener's explanation of how it works.[180] It is important to the Process for the scrivener to explain how an estate plan works and use diagrams, charts, and graphs as much as possible, particularly, when the Will is very complicated.[181] A testator is expected to be able to understand the basic contents of his or her own Will and the scrivener should know whether he or she does.[182] A jury expects a testator to know their Will or Wills and have the ability to catch a mistake or a bunch of mistakes, and their failure to do so calls into question their ability to understand the Will at all, particularly, if the mistakes are substantive.[183] If the mistake is by the scrivener it will be imputed to the testator.[184] For example, the math in the Will should work and simple math should not cause problems for the testator, and certainly not for the scrivener.[185] If a scrivener's notes reflected the testator wanted to leave 25% of her residuary estate to her two grandsons equally, but the scrivener wrote the two grandsons would divide 12.5%, the Will would, clearly, not reflect the

175. *In re* Boultinghouse's Estate, 267 S.W.2d 614, 618 (Tex. App.—El Paso 1954, writ dism'd).
176. *Id.*; *see* TEX. EST. CODE ANN. § 256.152 (Supp.).
177. *See* Brentin, *supra* note 42, at *8.
178. *See id.*
179. *See* Beyer, *supra* note 60.
180. *See* Brentin, *supra* note 42, at *4.
181. *See id.*; *see generally* Ralph E. Hughes & Robert P. Pizzuto, 1 CAL. TRANSACTIONS FORMS—EST. PLAN. § 1.48 (June 2018) (studies show that visual aids help to explain estate planning so that clients can better understand how estate planning works).
182. Brentin, *supra* note 42, at *4.
183. Beyer, *supra* note 60.
184. *See id.* (neglecting communications with client).
185. *See id.* (failure to gather sufficient information).

testator's intent.[186] The scrivener made the mistake, but the testator should have easily caught the simple math error, which proves the testator did not read the Will or understand it.[187] Another common mistake is when the testator "intended" to disinherit someone—usually a child/heir—with the premise being that the decedent did not want that child/heir to inherit from this estate ever, under any circumstance, yet, the "atom-bomb" provision leaves property to the decedent's heirs-at-law, which is a certain circumstance where that child/heir inherits directly contrary to the expressed disinheritance intent of the testator.[188] The rules of construction require determination of the testator's intent from the four corners of the document.[189] The Will should be written in clear, unambiguous terms, so the testator can understand it; and so the executor and beneficiaries can as well, post-death.[190] Mistakes in a Will make it difficult to glean the testator's actual intent and, in the example above, the parol evidence rule and rules of construction make the notes of the scrivener outside the Will irrelevant, since there is no ambiguity within its four corners.[191]

Discrepancies in the notes of the scrivener and the actual provisions of the testator's Will can be evidence of incapacity or undue influence or both.[192] One of the elements of testamentary capacity is that the testator be able to hold all the elements in his or her mind long enough to formulate a reasonable judgment about them.[193] If there are mistakes that indicate a disposition contrary to the testator's desires, it is expected that the testator would have the ability to find the error and ask that changes be made; absent that, arguably his or her judgment was impaired at the time the Will was signed.[194] If the testator did not recognize the mistake, then obvious questions arise about his or her ability to understand the document.[195] Mistakes can also indicate undue influence. For example, a testator is supposed to know his or her family members, but, when an undue influencer conveys family information to a scrivener and does not know about a child or a child's name or how to correctly spell it, then the scrivener will put

186. *See id.*

187. *See id.*

188. *Id.*

189. *See* 1 Patrick Pacheco, TEX. PRAC. GUIDE WILLS, TRUSTS AND EST. PLAN. § 4.365 (July 2018); *see also Formal Requirements—Testamentary Intent*, 12 TEX. FORMS LEGAL & BUS. § 24:86 (2018).

190. *See* Brentin, *supra* note 42, at *4.

191. *See id.*

192. *See, e.g.*, *In re* Estate of Danford, 550 S.W.3d 275, 282 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (showing that a party can offer a will from 2010 to contest the testamentary capacity issue).

193. *See* Prather v. McClelland, 13 S.W. 543, 546 (Tex. 1890) ("[Testator must] have had memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relations to each other, and be able to form a reasonable judgment as to them.").

194. *See* Brentin, *supra* note 42, at *4.

195. *See id.*; *see generally* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) for Probate Lawyers*, 18 PROB. & PROP. 28 (Feb. 2004) (discussing correcting mistakes in a Will).

incorrect information in the testator's Will.[196] The testator clearly would not have provided incorrect information about his or her family, so it must have come from someone else, i.e., the undue influencer. There is no logical explanation for a testator incorrectly identifying his or her own family or misspelling a family member's name in the Will; a grave mistake indicating invalidity.[197] These types of mistakes create the argument that the undue influencer did not know this information, so he or she could not convey it to the scrivener of the Will, which is direct evidence of undue influence.[198] This also underscores the dangers of obtaining information about an estate planning client from a third party, particularly, if they are not a family member.[199] Good Process requires the scrivener to get name and relationship information directly from the testator and allows the scrivener, very easily, to avoid such mistakes.[200] Good Process also requires a scrivener to proofread his or her work product to eliminate such mistakes.[201]

J. Logic Must Prevail

When drafting, interpreting, and determining whether a Will is valid, logic must prevail.[202] Does the Will make sense in the context of that client's relationships and station in life, and would the testator have done this Will, if he or she understood it?[203] A good example is disposition of ancestral property.[204] When property is passed down from generation to generation, the expectation is that it would continue on to the next generation.[205] When ancestral property is diverted out of the family by the testator—a testator who was proud of his ancestry and heritage—then questions arise because such diversion is illogical.[206] There better be a good and well documented reason for such a result or Will contestants will use the lack of logic to argue it was aberrational.[207] A jury will also probably not like that result and find a way to "make it right," by setting aside the Will.[208] Often a new spouse will promise, if given the property, he or she will use it to take care of the

196. *See* Beyer, *supra* note 60 (failing to independently verify information).

197. *See id.*

198. *See* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS, § 51:23 (4th ed. 2018); *see also* Truelove v. Truelove, 266 S.W.2d 491, 497 (Tex. App.—Amarillo 1953, writ ref'd) (stating that the "original testamentary intentions of the decedent" are listed as circumstances to be taken into account as bearing upon the issue of undue influence).

199. *See* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 51:35 (4th ed. 2018).

200. *See* Ryan, *supra* note 122.

201. *See id.*; *see also* Bradley E.S. Fogel, *Estate Planning Malpractice*, 17 PROB. & PROP. 20, 24 (2003).

202. *See id.*

203. *See id.*

204. *See* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 2:2 (4th ed. 2018).

205. *See id.*

206. *See id.*

207. *See* Beyer, *supra* note 103.

208. *See* 10 Gerry W. Beyer, TEX. PRAC., TEXAS LAW OF WILLS § 51:4 (4th ed. 2018).

testator's children.[209] It is incumbent on the scrivener to advise the client against leaving property in this manner because it does not require the surviving spouse to do anything once he or she owns the inherited property outright in fee simple title.[210] If the client still insists on this result, good Process would require writing a letter to the client explaining the hazards and documenting the advice against such disposition.[211] Another reason creating this situation is not advisable for the scrivener or the client is that it allows a second "bite-at-the-apple" if the jury does not set aside the Will because it will now be subject to a construction suit.[212] The Will contestant would request the court declare the bequest or devise of the property, ancestral or otherwise, to a new spouse or anyone else for the benefit of his or her children to have created a "secret trust" and that the spouse or other beneficiary was obligated to hold some or all of the assets in trust for his or her benefit.[213] Illogical results can create numerous scenarios not intended by the testator.[214] Establish a good Process that ensures the Will makes sense logically and clearly and affirmatively document illogical wishes of the testator, desired against the scrivener's advice.[215]

K. Multiple Wills/Documents

Similar to documenting history, it is always more difficult to contest multiple Wills than a single one.[216] This is not an endorsement for executing multiple Wills that say the same thing or just to create a history just for the sake of it, because the latter can create arguments of incapacity as well.[217] Why would the testator execute an identical Will years later?[218] Did the testator forget he had a Will?[219] Did the testator forget what it said?[220] These questions are hard to answer when there are no real changes to the Will or Wills. People change their minds and want to execute new Wills—a right that cannot be abridged.[221] When they do, be sure to properly document the

209. *See id.* § 45:1.
210. *See id.*
211. *See* Beyer, *supra* note 103.
212. *See* Beyer, *supra* note 16.
213. *See* Pickelner v. Adler, 229 S.W.3d 516, 527–28 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
214. *See* Beyer, *supra* note 60.
215. *See id.*
216. *See In re* Estate of Danford, 550 S.W.3d 275, 282 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
217. *See* Frederick K. Hoops et al., 1 FAM. ESTATE PLANNING GUIDE § 17:34 (4th ed. 2018) ("The draftperson who executes wills in multiple copies is increasing the likelihood of a presumed revocation of the will.").
218. *See id.*
219. *See id.*
220. *See id.*
221. *See* TEX. EST. CODE ANN. § 251.001 (Supp.).

reasons for the change as part of the Process.[222] A client may execute multiple Wills for many legitimate reasons, but, be careful as a scrivener, because a Will contestant can argue it indicates confusion or indecisiveness.[223] However, multiple Wills or codicils often makes a Will contest more difficult, due to having an established history and dependent relative revocation because more testamentary instruments must fall in order to get back to one that benefits the contestant or intestacy.[224] Each time a new document is executed, a new analysis of the testator's capacity, or whether undue influence occurred on that particular date must be made.[225] Dependent relative revocation presumes the testator wanted to die testate and that if one Will is found to be invalid, the one immediately prior to it shall control and so on.[226] The testator must be very clear when expressing a desire that dependent relative revocation shall not apply, and it is up to the scrivener as part of the Process to make sure such intent is properly and clearly expressed.[227] In addition, a codicil republishes the Will it modifies, even an invalid Will, such that they shall be read together as one document.[228] So, a codicil essentially establishes two dates upon which the Will validity analysis must be made.[229] Each testamentary instrument adds an additional question to the jury charge, so the contestant must prove invalidity of and the jury must analyze validity or invalidity of each document on each date, which makes the trial more difficult for the contestant.

III. CONCLUSION

The idea behind good Process is to avoid and prevent Will contests and to stymie estate litigators in the preparation of their cases.[230] As with any trial, the more evidence proving a position, the better.[231] Planning and establishing a Process strengthens the defense of a Will contest lawsuit; a lack of it strengthens the contestant's case.[232] All parts of that Process make a difference in how the case can and will be presented.[233] In establishing good Process, attorneys must decide what works and is best for them, their practice, and their clients.[234] Taking and keeping notes corroborates the

222. *See* Ryan, *supra* note 122.
223. *See* Hoops et al., *supra* note 246.
224. *See id.*
225. *See id.*
226. Carr v. Rogers, 383 S.W.2d 383, 384 (Tex. 1964).
227. *Id.*
228. Hinson v. Hinson, 280 S.W.2d 731, 735 (Tex. 1955).
229. *See* 59 A.L.R.2d 11 (1958); May v. Brown, 190 S.W.2d 715, 718 (Tex. 1945).
230. *See supra* Part II.
231. *See supra* Part II.
232. *See supra* Part II.
233. *See supra* Part II.
234. *See supra* Part II.

Process and juries want to see logic in an estate plan.[235] Explanations such as "the testator told me this is what she or he wanted" or "they got enough during the testator's life" are rarely sufficient to justify an aberrational estate plan.[236] An estate planner has an obligation to defend his or her work and owes a fiduciary duty to the client to express the client's testamentary intent and to ensure the client has testamentary capacity and has not been unduly influenced.[237] Asking questions that evidence capacity and that show relationships establish a foundation for the disposition in the Will; particularly, if there is a disinheritance.[238] Good Process will prevent the execution of a Will that never should have been executed in the first place because checks and balances are in place to ensure the client has the ability to understand the document and that it reflects their desired disposition.[239] A good Process prepares scriveners to defend their work product. Establishing and abiding a good Process arms estate planners with everything they need to contend with cross-examination in a Will contest. Estate planners should always operate under the premise that the strength of the Process will dictate the excellence of the product, which reinforces the credibility of the scrivener as a witness and often dictate the strength or weakness of a Will contest.[240] Develop a good Process and stick to it!

235. *See supra* Part II.

236. *See supra* Part II.

237. *See supra* Part II.; *see generally Frontiers in Ethics: The Estate Lawyer's Duty of Loyalty and Confidentiality to the Fiduciary Client: Examining the Past to Make Wise Choices Now and in the Future*, 33 OHIO N.U. L. REV. 807 (2007) (providing a historical overview on the estate planner's duty of confidentiality and loyalty).

238. *See supra* Part II.F.1.

239. *See supra* Part II.

240. *See supra* Part II.