

# Chapter 3

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## Introductory Clauses

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### § 3:1 Wills

#### § 3:1.1 Name of Testator

#### § 3:1.2 Recital of Residence

#### § 3:1.3 Limiting the Scope of the Will Based on Situs of Property

#### § 3:1.4 Statement Regarding Testamentary Capacity

#### § 3:1.5 Use of a Heading or Cover Page in Lieu of or in Addition to Introductory Clause

### § 3:2 Trusts

#### § 3:2.1 Trust Agreements

#### § 3:2.2 Declarations of Trust

### § 3:3 Nomenclature—“Last Will and Testament” or “Will”?

### § 3:1 Wills

The introductory clause of a will is intended to identify the testator. In addition to the testator’s name, it customarily contains a statement of the residence of the testator and language that serves to identify that the document is a will. However, there is no statutory requirement that a will have an introductory clause, and the language stating that the testator publishes and declares the document to be his or her will is not a substitute for the performance of any statutory requirement that the testator declare to the subscribing witnesses that the document is his or her will.<sup>1</sup> Such an oral declaration is a part of the statutory ritual of due execution, and nothing in the introductory clause or elsewhere in the will is by itself an acceptable compliance with the statute.

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1. EPTL § 3-2.1.

Finally, the introductory clause should indicate that the will being executed is the current will, and that all prior wills and codicils are being revoked as a result of the execution of the current will.

See below for a basic sample introductory clause.

**I, [NAME OF TESTATOR], presently residing in the City, County and State of New York, do make, publish, and declare this to be my Last Will and Testament, and I hereby revoke all my prior Wills and Codicils.**

As with much of the model language in this book, there is no magic to the precise wording. A “Will” is just as good as a “Last Will and Testament” (see section 3:3 below).

### **§ 3:1.1      *Name of Testator***

The full name by which the testator is known should be used. Unless the testator customarily writes out his or her middle name or names, initials may be used. It is preferable to use the name in which the testator’s property, such as bank accounts, stock certificates, and real estate, is registered. That suggestion is particularly pertinent to holders of real property, because the will forms part of the chain of title to the same extent as a deed.

Some testators have changed their name, have been known by other than their birth name for long periods of time, or use a different name in different contexts (for example, married women who use their birth name in professional dealings and their married name at other times). The alternative name may be given in this clause, preceded by such language as “also known as” or “formerly known as,” or a statement to that effect may be included later in the will.

### **§ 3:1.2      *Recital of Residence***

As stated above, the introductory clause customarily contains a statement of the residence of the testator. This may be by street address, or more commonly, by mention of the city, county, and state of residence, or the like. Such residence should be the legal domicile of the testator, and not merely a place where the testator may be residing temporarily (which may be indicated after the place of domicile by addition of the phrase “temporarily residing at . . .”). If after the execution of the will the testator should change his or her domicile to another state, this language will not preclude the offer of the will for probate in the state of the testator’s domicile at his or her death. That being said, as a measure of caution, a change of domicile should be followed by a review of the will to confirm that the provisions do not violate any law of the new domicile. The will should also be reviewed

in the light of possible statutory provisions in the new domicile creating a right, or a different right, in the surviving spouse to elect to take against the will.<sup>2</sup> There may also be different state or local tax consequences to the will's provisions in the new domicile.

The statement of residence assumes greater significance when the testator maintains a home in more than one state at the time of his or her death, so that a question arises as to what is the state of his or her domicile.<sup>3</sup> More than one state may be able to successfully assert the claim that the testator was domiciled within its borders, and the estate will then be subject to the estate or inheritance taxes of several states.<sup>4</sup>

A typical example involves a testator who spends part of each year in a home owned by the testator in a state other than the one he or she regards as his or her domicile. To clear the title to that home after the decedent's death, application must be made to the other state to fix and pay the inheritance tax on the home, so as to discharge the lien thereon. On that application, the other state has an opportunity to investigate the question of the testator's domicile. To reduce this risk, consider having the client own the non-domiciliary home through a trust, partnership, LLC, or corporation that may qualify as intangible personal property with a legal situs in the state of the client's actual domicile for tax and administration purposes. Instead of transferring title to the house, the executors may be able simply to transfer the stock of the corporation or other intangible personalty to the intended beneficiary without the need for an ancillary probate proceeding.

Note that if a client has contacts with multiple jurisdictions, it may be appropriate to include provisions in his or her will directing where the will is to be probated and what governing law will apply. For a more detailed discussion of these considerations, see section 12:9 below.

### **§ 3:1.3      *Limiting the Scope of the Will Based on Situs of Property***

As discussed throughout this book, each jurisdiction has varying rules when it comes to disposing of property via a will or trust. Therefore, in some circumstances, it may be advisable for a testator

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2. EPTL § 5-1.1-A. *See generally* section 2:3.3 above.
  3. SCPA § 103.15 defines domicile thus: "A fixed, permanent and principal home to which a person wherever temporarily located always intends to return."
  4. *See California v. Texas*, 457 U.S. 164 (1982) (holding that a state may file a bill of complaint against another state under the Supreme Court's original jurisdiction to decide whether a decedent was domiciled in the first or second state at the time of his death).

to have multiple wills for property in different jurisdictions. This may be especially true in the international context. Of course, the drafter should ask for copies of all other wills, and should also consult with the testator's counsel in other jurisdictions to make sure that the testator's estate plan is coordinated.

To ensure that the will the drafter is preparing does not inadvertently revoke or supersede a will from another jurisdiction, it may be advisable to limit the scope of the will. This can be done in the introductory clause as follows:

**I, [NAME OF TESTATOR], a citizen of the United States and of [ ], presently residing in the City, County and State of [ ], do make, publish, and declare this to be my Last Will and Testament applicable to all property, whether real or personal, tangible or intangible, owned by me at the time of my death or to which I may then be or may thereafter become entitled, other than any property owned by me which is situated in [ ], and I hereby revoke all my prior Wills and Codicils other than any Will which applies to my property of any kind, including real or personal, tangible or intangible property, situated in [ ] at the time of my death. The determination by my Executors as to the property passing under this Will shall be binding upon all persons interested under this Will.**

### **§ 3:1.4 Statement Regarding Testamentary Capacity**

Language in the will to the effect that the testator is of sound mind and disposing memory is sometimes included in the introductory clause. Yet, such a self-serving statement does not prove or disprove testamentary capacity.<sup>5</sup> That must be established from the facts existing at the time of the execution of the will, and an incompetent testator will not be rendered competent by the use of such words in the document.

### **§ 3:1.5 Use of a Heading or Cover Page in Lieu of or in Addition to Introductory Clause**

Some drafters prefer to state the name and/or residence of the testator not in an introductory clause as in the sample clause above, but in a heading or cover page. For example:

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5. For more on testamentary capacity, see section 2:2.1 above and section 16:7.1 below.

**Last Will and Testament**

of

**[NAME OF TESTATOR]****a resident of****[New York, N.Y.]**

In a short will, the use of a heading may seem more appropriate than an introductory clause. What is said above regarding the statement of name and residence in the introductory clause applies, of course, to such a heading. However, even if a heading or cover page is used, it is likely advisable to also include an introductory clause to ensure that prior wills or codicils are clearly revoked, and to limit the scope of the property disposed of by the will, if appropriate.

**§ 3:2 Trusts**

A trust created during the client's life has legal significance beyond testamentary disposition. There is a current conveyance of assets and often one or more parties other than the client. The form of the introductory clause in a trust is therefore different from a will in important respects.

**§ 3:2.1 Trust Agreements**

If there is an initial trustee other than (or in addition to) the creator of the trust (sometimes known as the grantor, settlor, creator, trustor, or donor, depending on local custom), the trust will be created under a trust agreement (sometimes known as an indenture or deed of trust). The introductory clause might read as follows:

**TRUST AGREEMENT made on [DATE] between [NAME], residing at [CITY, STATE], as Grantor, and [NAME], residing at [CITY, STATE], as Trustee.**

While the various alternative titles for the grantor noted above are essentially equivalent, once the trust agreement has identified that individual with one of those titles, it should be used exclusively throughout the agreement. Different model forms in this book use different terms (as none is intrinsically better than another), but if the drafter combines the forms, they must be edited to use a single, uniform term of art.

There is other information that should either be included in the introductory clause or in a recital at the beginning of the trust. Sample additional clauses to follow the initial introductory clause are below:

**WHEREAS, the Grantor desires to create a trust of the property hereinafter specified for the purposes hereinafter set forth, to be known as the “[ ] TRUST”, and the Trustee has agreed to accept and perform said trust in accordance with the terms and conditions set forth in this agreement (hereinafter referred to as this “Agreement”).**

**NOW, THEREFORE, in consideration of the promises and of the mutual covenants herein contained, the Grantor does hereby assign, convey, transfer and deliver to the Trustee the property set forth in Schedule A hereto annexed;**

**TO HAVE AND TO HOLD the same and any other property which the Trustee may hereafter at any time hold or acquire hereunder IN TRUST, NEVERTHELESS, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:**

In these introductory clauses (or later in the trust), the trust should be given a name for ease of reference. This name may be descriptive (for example, “The Roger Smith 2015 Trust for the Benefit of Sandra Smith”) or more general (“The Acme Trust”) as the situation warrants.

The trust agreement may also recite the purposes of the trust, although this is usually not mandatory. It may be useful (or conceivably necessary) to do so where there is a specialized tax purpose, to assist the trustees in interpreting the provisions of the agreement, or to comply with tax regulations.<sup>6</sup>

The trust agreement will also require a recital of conveyance of assets to the trustee. This can be a nominal amount (especially in the case of an “un-funded” trust intended as a receptacle for future transfers, insurance proceeds, or the like) or refer to an annexed schedule listing the transferred assets.<sup>7</sup>

Finally, the language in the above sample regarding subsequent additions to the trust may instead be placed in a separate article or clause in the body of the trust agreement.

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6. See chapter 14 below for a discussion of tax regulations relating to certain trusts.

7. This should not substitute for an actual conveyance or transfer of the assets. See EPTL § 7-1.18.

### § 3:2.2 **Declarations of Trust**

A declaration of trust, as opposed to a trust agreement, is established by only one party on both sides of the transaction. Thus, in some jurisdictions, a trustee can declare the trust without the need for the grantor to execute the document.<sup>8</sup> A declaration of trust may be useful where the grantor is not the trustee or where there is no grantor (for example, if the trust is created by the trustee pursuant to a decanting power, such as EPTL 10-6.6),<sup>9</sup> in which case the words “as Grantor” should be deleted from the introductory clauses.

The introductory clauses for a declaration of trust will be substantially similar to those of a trust agreement. A sample of such clauses is below:

**DECLARATION OF TRUST made on [DATE] by [NAME],  
residing at [CITY, STATE], as Trustee.**

#### W I T N E S S E T H

**WHEREAS, the Trustee desires to declare that it holds the property set forth in Schedule A hereto annexed for the purposes hereinafter set forth and upon the terms and conditions described herein, to be known as the “[ ] TRUST”;**

**NOW, THEREFORE, the Trustee hereby declares that the above described property and any other property which the Trustee may hereafter at any time hold or acquire hereunder, shall be held IN TRUST, NEVERTHELESS, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:**

Again, the language regarding additions to the trust may appear inserted in the body of the declaration of trust.

Note also that the formalities for transfer of assets to a trust established by unilateral declaration may be stricter than the requirements for a bilateral trust agreement.

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8. Under New York law, the creator of the trust and at least one trustee must sign the document to create a valid trust. EPTL § 7-1.17.
  9. EPTL § 7-1.17 was amended in 2010 to clarify that such a declaration of trust is technically valid in certain situations.

**§ 3:3 Nomenclature—“Last Will and Testament” or “Will”?**

The expression “Last Will and Testament” is derived from the historical background of testamentary instruments, when a distinction was drawn between a “testament,” a term derived from the Latin, which disposed of personal property under the principles of equity, and a “will,” a term derived from the Anglo-Saxon, which disposed of real property under strict common law. The word “will” is the current modern equivalent of both<sup>10</sup> and, although the heading customarily employs the longer form, it will suffice to use the shorter expression in the body of the document whenever there is need to refer to it.

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10. EPTL § 1-2.19.