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WILLS GONE WILD! DRAFTING WITH PROBATE IN MIND: ERRORS, OMISSIONS, NATURAL DISASTERS, AND HOW TO DEAL WITH THEM

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I. INTRODUCTION

The world of probate is actually not too wild, at least in uncontested probate,[1] and wills rarely cause a scene. However, issues in a client's will can make things difficult for family, and although most adults in Texas can draft a will without an attorney,[2] doing it yourself or hiring an inexperienced counsel can

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1. However, this author once witnessed an uncontested hearing to prove up a will become contested when an unrepresented lady, claiming to be the decedent's common-law spouse, appeared unannounced to challenge the named executor's appointment. She "did an internet search" and learned he was imprisoned in the late 1970's for selling drugs. The proposed executor had a common name and was no drug peddler. After the case was reset for the contested docket, much to the surprise of the estate's attorney, the purported common-law spouse met opposing counsel in the hall with her walker, he cussed her out (allegedly), and in a southern accent she witheringly stated, "Someone call the bailiff. . ." Zero to a hundred percent contested – *real quick*. Make sure to address a common law spouse situation in your will and recognize family members that shall benefit from your estate.

2. TEX. EST. CODE ANN. § 251.051 - 251.052 (West 2017) ("testator must be of sound mind, 18 or older, or has been married, is in the U.S. armed forces (or an auxiliary thereof), or U. S. Maritime Service; valid will must be: 1) in writing; 2) signed by the testator or another person in the testator's presence and under testator's direction; and 3) attested by two plus credible witnesses of 14 years of age or older signing with their own hand in the testator's presence No attesting witnesses required if wholly written in testator's

leave an estate destined for the probate pit of misery — "*Dilly Dilly!*"[3] The pitfalls for inexperienced practitioners drafting wills without probate in mind are more treacherous for lay persons using the internet or other DIY[4] resources to draft their own documents. Judge Google is not your friend and is no substitute for competent legal counsel. This article explores practice based issues associated with problematic wills from a probate and estate settlement perspective and how to avoid issues through drafting with probate in mind. The end of the article explores practical tips for keeping important documents safe during natural disasters.

II. WELCOME TO PROBATE AND ESTATE SETTLEMENT, WOULD YOU LIKE A SIDE OF EXTRA COSTS WITH YOUR ERRORS AND OMISSIONS?

Every will is unique because there is always a wrinkle that makes each one different from any other. This wrinkle often comes in the form of mistakes in executing or handling the will, omitting critical provisions that would decrease hurdles for probating the will and settling the estate, or both. Such problems associated with wills often lurk unseen until the need for probate arises. Some truisms about wills are: 1) attorneys and laypersons can make errors and omissions in drafting or handling a will; 2) surviving family members often mishandle a will by failing to admit it to probate within the four-year statute of limitations;[5] and 3) such problems can lie dormant for decades, thus complicating the probate and estate settlement process.

The handling of a will after the death of a testator is a frequent issue that makes a will unique. Couples married for decades with no separate property can have mirror wills[6] that are differentiated by the way they are handled. For example, failing to submit an application to probate a will by the fourth anniversary of a testator's death is the most common mistake people make. This is especially true if the will leaves everything to a surviving spouse or in equal portions to other beneficiaries who at least halfway get along. Many such people mistakenly believe nothing needs to be done when "everything was left to me." From there,

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handwriting").

3. *See* Bud Light, *Pit of Misery*, YOUTUBE (Feb. 15, 2018), https://www.youtube.com/watch?v=APi6l-y5i5M.

4. Stands for, "do-it-yourself."

5. TEX. EST. CODE § 256.003.

6. Mirror wills are common between spouses wishing to leave everything to each other. These wills contain identical provisions with the only difference being the names of the testator and primary beneficiary. Such wills should be executed in one signing ceremony for maximum efficiency and reduced risk of error.

any missing provisions or mishandled attesting witnesses make things worse, especially when the limitations period expires.

Un-probated wills held in hand past the limitations period have a good chance of containing other issues. Assume the limitations period has run and the only asset in the estate is a stock account. As the attorney, you see that on first glance, the will looks good, there are no debts in the estate, the will and self-proving affidavits are signed by attesting witnesses. Thus, you are excited about probating the will as a muniment of title, as it seems to be an easy case.[7] On closer inspection, the self-proving affidavit was signed by attesting witnesses over a year after the will was validly executed![8] Then you notice the will and self-proving affidavit were signed by different people, and your client is knee deep in the pit of misery.[9] Or maybe, Maw and Paw's wills named each other as executor but omitted naming successors. Maw and Paw passed decades apart without the survivor updating their will, the limitations period expired for both wills, the future client tries accessing a retirement account that does not have a beneficiary designation and attempts to do so without court issued letters of administration. Said person might need this money to pay past due property taxes on their childhood home, and probating these wills to access the account is the only way to save the house from property tax foreclosure. However, due to the expired limitations period, the client is now neck deep in the probate pit of misery where everything costs a little extra. Still, a probate and estate planning attorney can help such clients claw themselves up from pit of misery or help steer clear of it altogether.

III. HOW TO PREVENT THESE BASIC PREVENTABLE ISSUES

When I started practicing, I made the conscious decision to probate as many wills as possible before drafting my first will. This proved to aid me immensely in developing wills with probate in mind as the majority of my probate clients presented me with problematic wills containing mistakes that should have been prevented. Such mistakes are avoided through: 1) good client

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7. TEX. EST. CODE § 257.001(2); *Id.* at § 306.002(2)(c)(3) ("probate available for wills after limitations period to create a link in the chain of title for real property when probated as a muniment of title only and to collect property owing to the estate using letters of administration or the muniment of title order") (emphasis added).

8. No problem here, *see,* Tex. Est. Code § 251.103(2) – (period for making attested wills self-proved valid on date later than will's execution if during lifetime of testator and witnesses provided will meets requirements in § 251.051).

9. *Id.* at § 251.102(a)(1) ("code written in conjunctive form requiring signatures of testator and witnesses to execute valid self-proving affidavit to admit will to probate without subscribing witness testimony") (emphasis added).

intake; 2) the drafting attorney educating his client(s) about the statute of limitations for probating a will; 3) the attorney carefully orchestrating the will signing ceremony and not leaving the client to their own devices; 4) a non-experienced attorney referring wills clients to an estate planning practitioner or legal aid resource; or 5) a layperson hiring an attorney or seeking a legal aid resource other than do-it-yourself will kits found on the internet or elsewhere.

A. Client Intake and Education: Getting it Right

Client intake and education are big ticket items that grease the skids for admitting a will to probate. These items alone can make the application process easier for the probate attorney, simplify proving up the will, and save the probate client money. Basic client intake reveals a testator's assets, names of immediate and more distant family member(s) who shall benefit from the will, how bequests are received as well as naming an independent executor and or a trustee to without bond. Failing to name successor beneficiaries for certain bequests can be problematic. However, failing to name successor executors or trustees is arguably more problematic as doing so can leave estate or trust property wasting away in unmanaged limbo. A court must then appoint an independent administrator that all distributees can agree on or a new trustee.[10] Doing so is likely most problematic in dysfunctional family or blended family situations where beneficiaries do not get along, are at odds with a surviving spouse, or both. Thus, naming one fiduciary is not good enough. Naming two is better, and naming three is optimal.[11] Wills can survive

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10. *Id.* at §401.002(b) ("all the decedent's distributees may collectively designate in the application for probate of decedent's will, or in other separate documents (comprehensive waiver of citation of service), qualified person(s), a firm, or corporation to serve as independent administrator"); However, *see* TEX. PROP CODE § 113.083(a) (1984) (if a successor trustee is not selected per terms of the trust agreement, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest); *id.* at § 111.004(7) (2013) (for this purpose an "interested person" is a beneficiary or any person with an interest in or claim against a trust, however, this definition may vary and must be determined by the purpose of the proceeding, and such persons likely include grantors, beneficiaries, remaindermen, and creditors).

11. Based on personal experience with wills, three is optimal because things happen and wills have a long shelf life. Trusts are no exception. Even trusts granting a trustee and successor powers to appoint co-trustees and corporate fiduciaries during life and through their duly probated wills can be left without a fiduciary in place should said persons die without making timely appointments thus leaving trust property in unmanaged limbo and unavailable to any beneficiaries. This author is currently negotiating with a major international bank to issue the funds of a small trust to its sole beneficiary for this very reason. Trusts appointing lay-person trustees should have a provision requiring them to consult with an estate planning attorney, financial advisor, or wealth management professional experienced in trusts or fiduciary representation to advise and assist in preventing these and other problems associated with mismanaged trusts.

unchanged for decades,[12] and anything can happen during that time. Thus, properly naming fiduciaries is an important part of the intake process, as is client education.

Educating wills clients during the intake process is the attorney's first chance to teach them about important parts of the probate process, such as the four-year statute of limitations. It is equally important to inform clients about the common misconception that leaving everything to one person or a few people equally does not negate the need to probate a will. In fact, failing to timely probate a will is a common problem as it is something few people have exposure to, it is easy to put off, or applicants "just didn't know." Wills can only be probated after the limitations period in two instances; 1) to provide a link in the chain of title for real property;[13] and 2) for accessing property owing to an estate.[14] This is a nightmare for applicants faced with unexpected circumstances such as looming property tax foreclosure. If the only assets in an estate are the formerly property tax exempt home of an elder family member and an IRA without a beneficiary designation, gaining access to funds without court documents will not happen.[15] Comprehensive client intake educates clients on the importance of having named beneficiaries for non-probate assets in addition to gathering other necessary information and addressing the importance of timely filing.[16] Though not guaranteed to prevent untimely filing and associated issues, client education is one way to help prevent multiple preventable issues. So, as you go forth, teach your clients, draft their wills, and have them ceremonially signed.

B. Signing Your Will: Do it Once and Do it Right with Competent Legal Counsel

It all comes down to the signing. The ceremony is often a tedious process for creating a valid will. Besides the testator, two witnesses, a notary, and the attorney are needed when signing the documents.[17] Nonessential personnel should be absent or limited

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12. This author recommends that estate planning devices be reviewed every five years or after every major life event.

13. *See supra* note 6.

14. *Id.*

15. This author has had numerous clients experience these issues.

16. Non-probate assets include, but are not limited to: IRAs, life insurance policies, stock accounts, etc.

17. The attorney should gather the requisite parties, place them strategically at a table and have relevant parties sign or initial one page at a time in a logical order. The attorney should collect pages only initialed by the testator, then circulate signature pages from testator, to witness one, to witness two, then to the notary for their signature and seal. Blue, non-smearing ink for signing is preferred and helps distinguish copies from originals.

as they present unnecessary distractions. Plus, ceremonies often include the signing of other planning documents.[18] In short, there are many places to sign or initial, opportunities to mix up papers, skip signatures, and create errors.[19] It is imperative for attorneys to retain control of the signing ceremony and avoid handing legal documents to their clients with a set of instructions, which can be ignored and make probate more difficult.[20] An attorney serving as a disinterested master of ceremonies can help limit errors and omissions at signing. Not having one is risky.

For example, consider the following practice-based scenario.[21] A testator and two attesting witnesses execute a valid do-it-yourself will without an attorney present and either forget to, or intentionally skip executing the self-proving affidavit. Testator and witnesses then sign the self-proving affidavit over a year later, but the testator failed to utilize the same two witnesses who signed the will, and the self-proving affidavit is now useless.[22] An attorney supervising the process could have prevented this critical omission and saved a beloved probate applicant money years later — after the statute of limitations. Using a one-step, simultaneous execution, attestation, and self-proving affidavit can help prevent this issue with fewer pages to sign and less confusion.[23] However, it is likely inaccessible to laypersons and not provided by online legal services or other will kits.[24] Therefore, clients are better served by working with an experienced attorney.

C. The Difference between Inexperienced Attorneys,

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18. This author's clients often sign a statutory durable power of attorney, medical power of attorney, HIPAA release, advanced directive, declaration of guardianship for minor children or adult, an agent for disposition of remains in addition to a will.

19. *See* Professor Gerry W. Beyer, *The Will Execution Ceremony,* 1999, http://www.professorbeyer.com/Archive/new_site/Articles/Will_Ceremony.html (describing tips for singing ceremonies).

20. A benefit of controlling the signing ceremony is that testator's and witnesses can also sign the attorney's notary book, which also provides proof of execution of a lost will.

21. Though this testator made mistakes when creating a will on his own, it was otherwise valid and admitted into probate.

22. TEX. EST. CODE ANN. § 256.153 (West 2014) (thus attested and non-self-proved wills require sworn testimony or affidavit of one or more subscribing witness to will in open court, oral or written depositions for a subscribing witness residing outside the county or resident unable to attend, or by two non-subscribing witnesses to the handwriting of a subscribing witness or testator via sworn, live testimony or an affidavit executed in open court, or by oral or written deposition).

23. Many wills have a two-step signing process where testators and witnesses sign twice, once for attestation and once in the self-proving affidavit. However, Estates Code § 251.1045 allows for a simplified, one-step, simultaneous execution and attestation signing process dispensing with the need for additional pages and signatures. Track the statute word for word and fit the one-step execution and attestation to one page.

24. Legal Zoom, Nolo, and other do-it-yourself estate planning products often use the old two step signing process where the testator and subscribing witnesses sign the will, then sign a self-proving affidavit that does not track Tex. Est. Code § 251.104.

Laypersons, and Estate Planning Attorneys: The Devil is in the Details

The problems mentioned above resulted from two possible scenarios: 1) an attorney unfamiliar with estate planning drafted the wills or 2) a lay person using online legal services. For instance, the powers of a named, independent executor in a validly executed and notarized 1½ page will, drafted by an attorney, can be admitted to probate without a self-proving affidavit. However, an ounce more effort from the attorney would have produced a self-proving affidavit and express provisions granting the executor at least some powers, like the power of selling the Decedent's real or personal property to settle debts. Although this power is implied, title companies may require every beneficiary to sign closing documents for the sale of real property if a power of sale is not expressly granted in the will.[25] This is a headache for an executor if beneficiaries cannot get along. However, a client may not want to grant broad executory powers in their will, which is why client intake is important. Executory powers aside, an absent self-proving affidavit is unacceptable for wills drafted by legal counsel and results in an unnecessary expense for future probate applicants.

Invalid or non-existent self-proving affidavits require witness testimony to prove up a will in court, resulting in increased expenses for the probate client. Live testimony of an attesting witness is the gold standard. If witnesses are no longer living, the notary can serve as the witness, if not, two disinterested witnesses are required as stated above. As time goes on, finding such persons can become increasingly more difficult.[26] Thus, a missing or invalid self-proving affidavit is a highly preventable problem that is frustrating for a testator's family. Foregoing such a basic provision is a disservice to clients, especially those with low incomes believing they are getting real value and security from a legal document. Therefore, attorneys unfamiliar with the nuances of wills should refer clients to an experienced estate planning

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25. *See* TEX. TRUST CODE Ch. 113 (ensure executors have full authority to act by granting them all the powers of a trustee under the Texas Trust Code); TEX. EST. CODE §§ 402.052; TEX. EST. CODE 356.251(1)(E) (when read together, independent executors and administrators have the same powers to sell estate property as representatives in a dependent administration to pay claims against the estate without court approval, unless powers are limited by terms of the will – title companies not bound by these code provisions).

26. This author was recently contacted by a fellow practitioner who took on a probate case pro bono for the sole surviving beneficiary of an estate. The testator was in her 90's at the time of her passing and both witnesses having predeceased her. The will was executed circa 1975, has no self-proving affidavit, not many living people that may attest to her handwriting. My suggestion, look for the notary, she could still be living, somewhere. . .

attorney or legal aid resource.[27] Similarly, lay persons seeking to create a will on their own should consult with a legal aid resource or find an affordable attorney, since internet will kits often contain hidden traps for the unwary.[28] Which route the client chooses will determine whether their will costs their family or client more or less in the end.

IV. PROTECTING IMPORTANT LEGAL DOCUMENTS FROM NATURAL DISASTERS IN LIGHT OF HURRICANE HARVEY

Nothing can ensure important legal documents like wills, powers of attorney, premarital agreements, and others remain one hundred percent free from the destructive forces of nature. In fact, destructive natural events like Hurricane Harvey affect everyone in a storm's reach. They bring devastating winds, storm surges, flood waters, and more to the Texas Gulf Coast. Whether a client's home suffers damage or not, it is difficult to predict how the event will affect important legal documents. If a client's home was flooded or destroyed, the same is likely true for any legal documents. Even if the client's home was unaffected, the client must ask whether his or her job, financial institution, attorney's office, or other place where documents are stored, was safe from the storm. Just because a home survives, does not mean the client's important documents survived.[29] Though preserving legal documents is probably the last thing on one's mind when disaster strikes, steps taken beforehand increase the chances of a client's

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27. Legal aid resources include: Lone Star Legal Aid, Houston Volunteer Lawyer Program, Houston Bar Association LegalLine 713.759.1133, Consejos Legales 713.759.1133, University of Houston Law Center Civil Practice Clinic, Legal Action Works (The L.A.W. Center), Dallas Volunteer Attorney Program, Texas Rio Grande Legal Aid, The Barshop Jewish Community Center, AIDS Services of Austin, Texas Accountants & Lawyers for the Arts, El Paso County Dispute Resolution Center. *See* Justia, https://www.justia.com/lawyers/estate-planning-and-probate/texas/houston/legal-aid-and-pro-bono-services (last visited February 15, 2018) (listing some of the above organizations in Houston). Justia also functions as a resource for other geographical and practice areas.

28. Issues with Legal Zoom and other DIY estate planning kits observed by this author and other estate planning practitioners include: lack of residuary clause resulting in partial intestacy thus requiring determination of heirship; lack of specificity in charitable gifts, i.e." $10,000 to Nurse Scholarship;" self-proving language not tracking the statute or non-existent self-proving affidavit; not accounting for special needs child; distributing all to children and leaving spouse nothing; not being governed by Texas law; not including language that executors and trustees should serve without bond; and premade documents containing inflexible provisions.

29. For example, this author's grandfather lost his will and WWII medals when Tropical Storm Allison flooded the Houston area in 2001, and the contents of many safe deposit boxes in banks in flooded areas of Houston were soiled after Hurricane Harvey. This author had one client whose original will and other items were contained in a flooded safe deposit box in a single-story bank. He was unable to access his box for a month and a half while the bank demolished its interior.

documents surviving a destructive event and allows both attorney and client to focus on what truly matters. In addition, since attorneys are also affected by these devastating storms, it is a good idea for attorneys to have plans to safeguard any documents they hold for clients.

Protective measures come in many forms. To start, some legal documents, like an original will, statutory durable power of attorney, and premarital agreement can be filed at the county clerk's office. Specifically, wills are filed in the probate records department for safekeeping in the county where the testator resides, statutory durable powers of attorney are filed in the real property records in the county where the principal resides,[30] and premarital agreements are filed with the real property records in the counties where a party resides and those where real property subject to the agreement is sited.[31] Said documents are accepted for a filing fee that varies by county.[32] Copies of legal documents related to one's medical care,[33] however, should be filed with a treating physician or family doctor's office — never an original. Filing original documents with the county clerk is not for everyone, and filers should do their homework before heading to their clerk's office.

Drawbacks to filing a will with the county clerk are: will retrieval policies vary by county,[34] some documents become public records,[35] and sometimes things just happen. Retrieving a will by an authorized individual is as easy as presenting a photo ID in most instances,[36] but a court order is likely required for retrieval

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30. Costs for filing will for safekeeping may range from $0.00 to $26.00 depending on the county. Some, like Harris County, follow Tex. Est. Code § 252(b) and charge $5.00.

31. TEX. FAM. CODE §4.106(b) (2017) (filing partition and exchange of property in premarital agreement in the deed of records where affected real property is located likely binding on creditors).

32. Many counties charge $26.00 for the first page and $4.00 for each additional page.

33. Medical powers of attorney, HIPAA releases, and advanced directives.

34. Bell County only allows named executors to retrieve wills; Bosque County does not record wills; Brooks County requires no proof of death as the county is so small, "they know everybody." Contact your county clerk's probate office for more details. If problems retrieving a will arise, Tex. Est. Code § 252.101(2) may help ("county clerk shall notify each person named on will wrapper endorsement that will is on deposit in clerk's office if clerk receives other notice or proof of death sufficient to convince clerk that testator has died") (emphasis added). Some counties accept an obituary as sufficient notice.

35. Statutory durable powers of attorney, premarital and post marital agreements filed in the real property records become public. Wills filed with the county clerk's probate department (if one exists) are private. However, any wills in the real property records become a public record. This is not recommended during the life of the testator, but after death, filing a will in the real property records with the order admitting it to probate as a muniment of title serves as a link in the chain of title for a decedent's real property. Consult with an experienced attorney before filing any documents.

36. Some counties require proof of death by showing a death certificate or obituary, and some counties notify authorized individuals on receiving notification of a person's death

if the receipt is lost or for those needing access other than authorized persons.[37] Unlike the confidentiality enjoyed by wills filed for safe keeping, statutory durable powers of attorney and premarital agreements become a public record when filed.[38] For those prioritizing privacy, filing with the county clerk is not the best option, but if the client lives in a flood prone area, it is better than losing important original documents whose renewal can be difficult to obtain. There is also the looming possibility of a disaster affecting the courthouse or clerk's office during an extreme weather event like Hurricane Harvey. This also poses a problem for wills filed for safekeeping as the original documents are invariably sealed, or kept under lock and key where they still can be destroyed or soiled during extreme weather. In Harris County, several courthouses experienced severe damage from flooding and other weather-related issues. Thus, it is prudent to know whether the building housing the probate and property records is prone to flooding or other issues.

A final consideration is that attorneys should provide clients with copies of executed documents that are useful for the clients to have.[39] Protecting these copies is essential if stored at home, work, or even in a safe deposit box. For instance, hard copies (and originals if any) should be stored in a safe place inside a sealed, clearly labeled, moisture resistant, puncture tamper and tear resistant document mailer or sturdy Ziploc-type storage bags that zip or click to seal closed.[40] Having electronic copies backed up to a secure internet cloud server is helpful, too.[41] Storing copies on a credible time-tested, online backup service, leaving passcodes in a safe place, and sharing the folder and password for view only

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after checking the name against the clerk's will index.

37. Storing the receipt in a custom will envelope and placing it with other legal documents is encouraged as testators frequently forget to tell family or future executors a will is filed for safe keeping. This helps the receipt to be easily located. If a will is missing, one should check the county clerk's records.

38. Successor statutory durable powers of attorney filed in the count property records are considered to revoke prior filings.

39. Filing an original will with an application for probate is needed for proving up a will, however, a copy can pass muster with additional application requirements if the original is destroyed in a disaster or lost. Not so for a durable power of attorney, as a non-certified copy is useless, and only certified copies from the county clerk are as good as an original.

40. Documents should be placed in a fireproof safe heavy enough to protect against theft and preferably above potential waterlines. Flood waters in Harris County during Hurricane Harvey reached as high as 72 inches in some places. A 2.5-gallon food storage bag will work in a pinch, and office supply stores carry 11"x 13.5" document mailers made of durable polyethylene that are water, puncture tamper and tear resistant and come with a corrugate insert to help prevent damage. Such self-sealing document mailers are highly recommended.

41. Some financial advising firms provide such a service to their clients on their own private servers.

access with trusted individuals is recommended by some practitioners. Though, nothing can ensure self-stored copies and original documents are one hundred percent safe from disaster, any extra measures a client or attorney can take to keep them safe is better than doing nothing at all.

V. CONCLUSION

The probate process is full of small but important technicalities that can frustrate clients. A good estate planning attorney can help alleviate these problems though attention to client intake, client education, and strict adherence to signing formalities. Attorneys should always strive to produce the best possible solutions for drafting and handling their clients' wills by using the same attention to detail for all clients whether they have one dollar or a million. In addition, estate planning attorneys are in a unique position to help their clients plan to protect these important documents, even in the face of natural disasters. While "do-it-yourself wills" and online kits may be tempting, there is no substitute for the expertise of a competent estate planning attorney that can help avoid traps for the unwary.