

SOS: We are flying to Europe in two hours and don't have an estate plan!



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Most attorneys who work in the estate planning field have received a panicky, last-minute call from a client or potential client who is about to go overseas on a big trip (generally, the vacation of a lifetime). The anxiety, uncertainty, and excitement of the coming adventure come together and provide motivation to get one's affairs in order. Unfortunately, this sometimes leads to the action of calling the estate planner the morning of the departure (or with just a few days to spare).

Because slap-dash estate planning is as bad as it sounds, and because a morning-of call leaves zero room for the estate planner to meaningfully react, most clients or potential clients end up, as a practical matter, taking the plunge and leaving for the vacation without having an estate plan in place. They generally have a great time. After all, they are far more likely to trigger the real need for their estate planning documents on their daily commute or driving to the airport for that grand vacation.^[1]

So, while I recommend proactive planning and treating one's daily commute as riskier than European travel, is there anything that can be done last-minute, even if it's not a good idea to approach estate planning that way? As it turns out, as un-recommended as it may be, there is.

Guardianship of Minor Children

Traditionally, parents of minor children propose their preferred guardian or guardians for their minor children in their wills. The preferred guardian, as expressed in the will, is entitled to priority consideration from the court.^[2] But if you're leaving for Europe the next day, there's not a lot of time to follow the standard process for creating a will with an estate planner.

In 2021, the Arkansas legislature created a "last-minute" method for parents to propose temporary guardians of their minor children in the event of their untimely deaths. Under Ark. Code Ann. § 28-65-222, parents may appoint temporary guardians of their minor children through a notarized signed writing that: (i) states the names and birthdates of their minor children, (ii) states the name of each person being appointed as a guardian and (iii) contains the sworn attestation of two witnesses who witnessed the parent sign the writing.^[3]

While being able to assemble two witnesses and a notary would seem to indicate the same threshold as a formal will signing, wills cover more areas than just the proposed guardian for any minor children, and thus this statute does provide an option, without the need to address any of the other topics traditionally covered by wills, for the imminent Europe-bound parent.

Further, there is no express requirement in the statute that the witnesses be "disinterested," so in theory each parent could count as one of the two required witnesses for the other parent. Also, while witnesses to a will must be 18 or older,^[4] there is no such requirement in Ark. Code Ann. § 28-65-222 with respect

to a witness's age, begging the question of whether or not the minor child could also count as a witness to a parent's signature.^[5]

Given these unanswered questions and the unclear standard of whether or not the witnesses must actually sign the notarized writing, by the time the parent has assembled two adult witnesses and a notary to create the required document (to put it beyond all question), and has everybody sign, it is likely taking place in the terminal outside security.

Holographic Wills

It is generally not best for the average person to compose their own will. George Washington apparently composed his own will, but he also did not have to contend with the myriad of probate codes, income tax laws, and estate planning options that are realities in our modern world.

Still, if a prospective traveler is convinced they are likely to go down in a plane crash off the European coast, something may^[6] be preferable to nothing, and Arkansas law has an option.

Under Ark. Code Ann. §28-25-104, if the "entire body" of the will is in the testator's own handwriting, then the will may be proved by three witnesses to the handwriting of the testator, not to the testator's creation of the will itself.

Rather than attempt to determine what is the "entire body" of the will (a question Arkansas courts have struggled over), the approach for the individual driving to the airport would be to take a blank sheet of notebook paper and start from scratch. While it would be beyond the scope of this blog post, good sense, and my malpractice carrier's guidelines to attempt to guide the individual in what they should then begin to write on that blank piece of paper, the person attempting to compose their own will on a piece of notebook paper on the way to the airport can at least be sure a probate court will consider it.

In sum, estate planning is best considered as soon as one returns safely from that European vacation to the dangerous reality of American highways, when there is time to properly engage and talk through the various aspects of a good estate plan with an experienced professional.

^[1] <https://www.pbs.org/wgbh/nova/planecrash/risky.html>

^[2] Ark. Code Ann. §28-65-204(b)(1)

^[3] The statute does not define "sworn attestation" in a way that makes it clear if the witnesses' signatures are required, or not.

^[4] Ark. Code Ann. §28-25-102(a)

^[5] "This court has consistently said no precise age of testimonial competency in children exists, and it is primarily for the trial court to determine whether a child has the ability to observe, remember and relate the truth of the matter being litigated and has a moral awareness of the duty to tell the truth." *Hoggard v. State*, 277 Ark. 117, 122, 640 S.W.2d 102, 105 (1982).

^[6] Sometimes nothing is preferable to a confusing something. *See Meadows v. Ferrell*, 2013 Ark. App. 106 (2013).