

MASSACHUSETTS Lawyers Weekly

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■ MARCH 25, 2026

VERDICTS & SETTLEMENTS

Testator can serve as witness to joint codicil with spouse

Case of first impression in Massachusetts courts

■ ERIC T. BERKMAN

A testator could serve as a witness to his wife's execution of a jointly written codicil to their will, a Probate & Family Court judge has ruled in a case of first impression.

Decedent Estelle A. Rose and her husband, Robert W. Rose Sr., signed a handwritten document removing their son, objector Timothy Rose, as a beneficiary of their will. Robert Sr., Estelle and a notary each signed the purported codicil.

After Estelle died, Timothy filed an objection to probate of her will, arguing that it was legally impossible for Robert Sr. to act as both testator and witness to the codicil, resulting in there being only one witness to Estelle's execution and rendering it invalid.

But Judge Elaine M. Moriarty, sitting in the Fiduciary Litigation Session, disagreed.

"No Massachusetts case law is cited supporting Contestant's argument that the codicil requires a second signature of husband to be a valid witness for Decedent in order for the codicil to be effective," Moriarty wrote, noting that courts considering the issue in other jurisdictions have held that a testator can simultaneously serve as a witness to a co-testator's signature. "The Court finds as a matter of law that the codicil satisfies the requirements of M.G.L. c. 190B, section 2-502 and that ... [t]he codicil is duly executed."

Moriarty similarly rejected Timothy's argument that the notary could not also sign a will as a witness, since there is no

requirement that a will be notarized in the first place and having it notarized simply enables allowance of the will as self-proving.

The seven-page decision is *Estate of Estelle A. Rose*, Lawyers Weekly No. 15-001-26.

TESTAMENTARY INTENT

Eric D. Correira of Swansea, who represented the petitioners, noted that Estelle and Robert Rose Sr. did not consult with an attorney when they drafted the codicil.

"This case shows why maybe you shouldn't do your own will," he said. "The entire situation would never have occurred had they gone to an attorney and had a codicil written with two disinterested witnesses and a notary in a law office."

He also said the decision shows that someone's testamentary wishes should not be voided simply because they did not follow standard procedure.

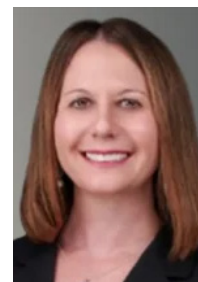
"It's worth noting that the court looked at the Massachusetts Uniform Probate Code, and there's policy built into it that we shouldn't fault people for doing handwritten documents and should try to effectuate their intent," Correira said. "I brought this up during oral argument and told the judge this is probably the worst codicil I've ever tried to probate. But at the end of the day, this isn't graded. It's 'pass/fail' and this is probably a C-minus, but it passes the test."



Eric D. Correira
Represents
petitioners

The objectors' attorney, Thomas P. Killo-
loran of Fall River, said that prior to adoption of the MUPC, courts always required two independent witnesses, and he continues to believe it is important to have two witnesses.

"I don't feel that when you're signing a document jointly with, in this case, a spouse, you're acting as an independent witness. I think you're acting as a maker or testator," said Killo-
loran, whose clients are weighing an appeal. "I understand in the MUPC they're trying to relax some of the formalities, but they were clear that they didn't want to relax that two-witness requirement. I think this further erodes it."



Marlee S. Cowan

Marlee S. Cowan, a probate attorney in Boston, said the judge reached the right decision.

"One of the things that guides fiduciary law in general is upholding someone's intent, and in my experience, judges can kind of go out on a limb to make sure the testator's intent is upheld, even if there may be some wacky procedural issue that it could technically be overturned on," Cowan said.

As far as the broader issue of whether the husband should count as a wit-

ness, Cowan said the objective behind the statute's requirement of two witnesses was met by the husband signing the codicil.

"He was there and he saw his wife sign," she said. "To say otherwise flies in the face of the purpose of the statute."

Harry M. Haytayan Jr. of Waltham said the case reminded him of a case involving a deathbed will and a lot of money at stake that he tried before the late Judge Edward M. Ginsburg nearly 40 years ago.

The proponent had a piece of paper with a list of charities the testator's lawyer had taken from the testator a week before her death, Haytayan recalled. The lawyer had never gotten around to finalizing the codicil and took it to the hospital hours before the testator died.

"The testator put an 'X' on the document," Haytayan said. "By that time, the testator's body was riddled with cancer, including in the brain. Judge Ginsburg looked at the paper the testator wrote on and said, 'That's what the testator wanted.'"

Similarly, in *Estate of Estelle A. Rose*, the judge looked at the codicil and determined that was what the wife wanted, Haytayan said.

"That's the modern approach: Let's implement testamentary intent instead of focusing on dotting the i's and crossing the t's the way the formalistic approaches were. And that's what Judge Ginsburg did almost 40 years ago," Haytayan said.

WILL DISPUTE

Estelle executed a will on Nov. 26, 2002, naming her husband, Robert, who ultimately predeceased her, as beneficiary and personal representative.

Estelle's will stated that in the event her husband predeceased her, certain real estate would be divided among her four children with the residue going to her children, grandchildren and great-grandchildren.

The will also nominated children Susan A. Silvia and Robert W. Rose Jr. as personal representatives in the event her husband predeceased her.

On April 29, 2014, the decedent and her husband signed a handwritten document removing son Timothy as a beneficiary and reducing the shares of two other beneficiaries.

The document was signed by the decedent, her husband and notary Nancy Ritchie, a paralegal who knew the couple personally and apparently was familiar with Massachusetts estate planning documents.

The notary later stated that she reviewed the document before the decedent and her husband signed it and understood it to be a joint codicil to their will.

She also stated that the couple signed the codicil as witnesses for one another in her presence and that each acknowledged to one another that it was their joint codicil.

Ritchie, who then notarized the document, later testified that she understood she was witnessing a codicil, as witnessing written documents is a notarial act.

Estelle died on May 16, 2024.

Susan and Robert Jr. filed a petition for formal probate that included both the 2002 will and 2014 handwritten document.

Timothy and the decedent's grandson Keith filed an objection to probate of the will.

Specifically, Timothy challenged execution of the 2014 codicil that disinherited him, asserting that Robert Sr., as a testator, could not also be a witness, and that the notary was not a valid witness either.

The petitioners moved for summary judgment.

VALID WITNESSES

Moriarty granted the petitioners' motion, ruling that the codicil was indeed in writing and signed by the testator and at least two witnesses as required by the MUPC, G.L.c. 190B, §2-502.

In making her finding, the judge noted that while joint wills are not common and "may not be preferable," no statute or case law was cited as prohibiting them, and, in fact, the law anticipates them.

Estate of Estelle A. Rose

THE ISSUE: Could a testator serve as a witness to his wife's execution of a jointly written codicil to their will?

DECISION: Yes (Probate & Family Court/Fiduciary Litigation Session)

LAWYERS: Eric D. Correira of Correira Law, Swansea (petitioners)

Thomas P. Killoran of Killoran & Killoran, Fall River (objectors)

Turning to the contestant's arguments, Moriarty rejected Timothy's assertion that the notary was not a valid witness.

"The fact that she signed as a notary does not preclude her from being a valid witness," Moriarty said. "There is no requirement that the will be notarized. ... Courts that have considered the issue of a notary signing as a witness have held that the notarization is surplusage and beyond what the statute requires (if not a self proving will)."

As to whether Robert Sr. could serve as both testator and witness to a joint will, Moriarty looked to cases from California and Texas as persuasive authority.

The California Appeals Court noted in a 1964 case that if there were two separate pieces of paper on which the will was drawn, each spouse was competent to act as a witness for the other.

Meanwhile, Moriarty continued, the Texas Court of Appeals held in 2009 that the testator's signature on a will could constitute both a co-testator's signature and a witness signature.

"[I]f [a person] qualifies as a competent witness ... her signature may serve as a witness' signature, regardless of her intended language in signing the will," Moriarty wrote, quoting the Texas court's language.

Accordingly, she concluded that the codicil was duly executed as a matter of law.