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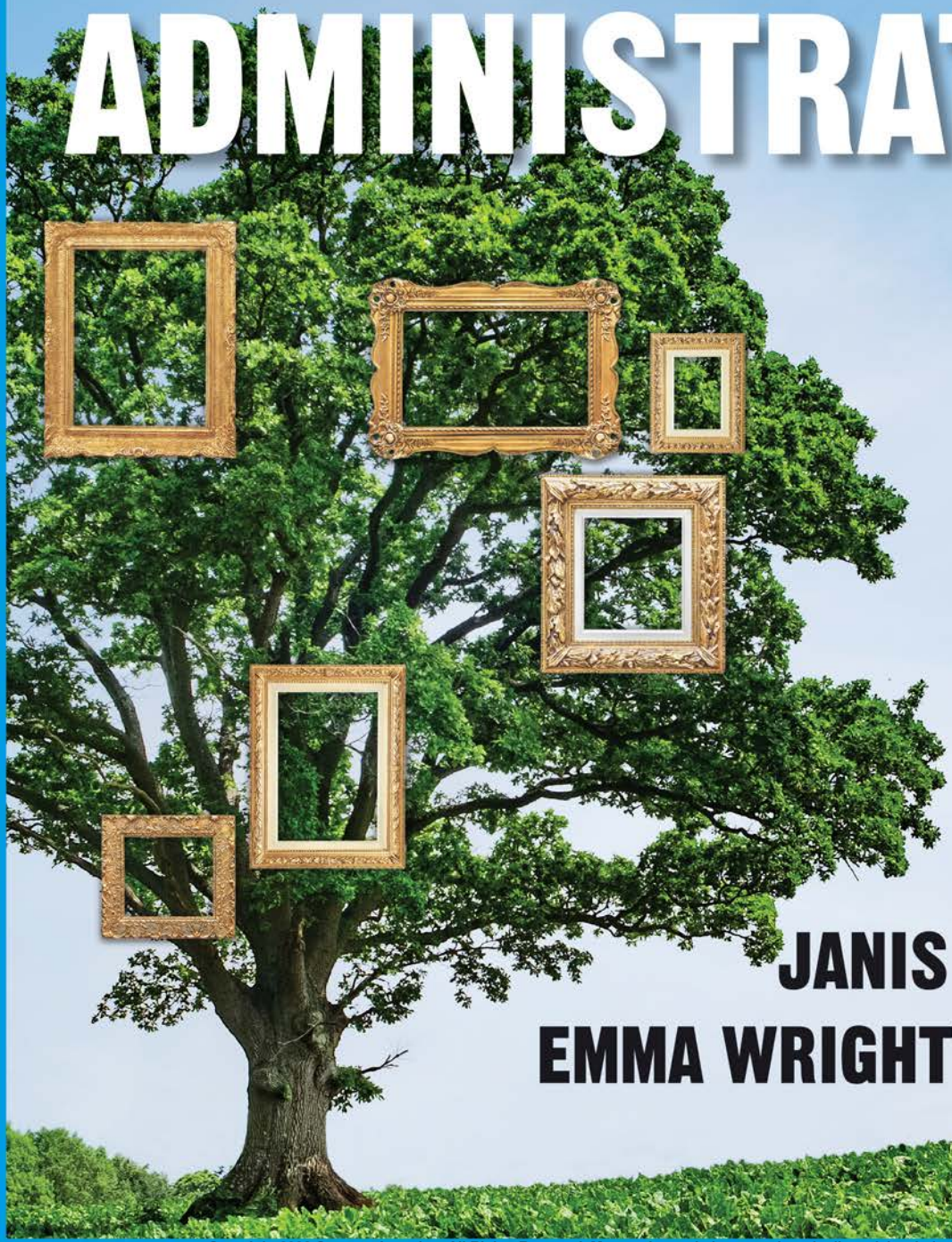

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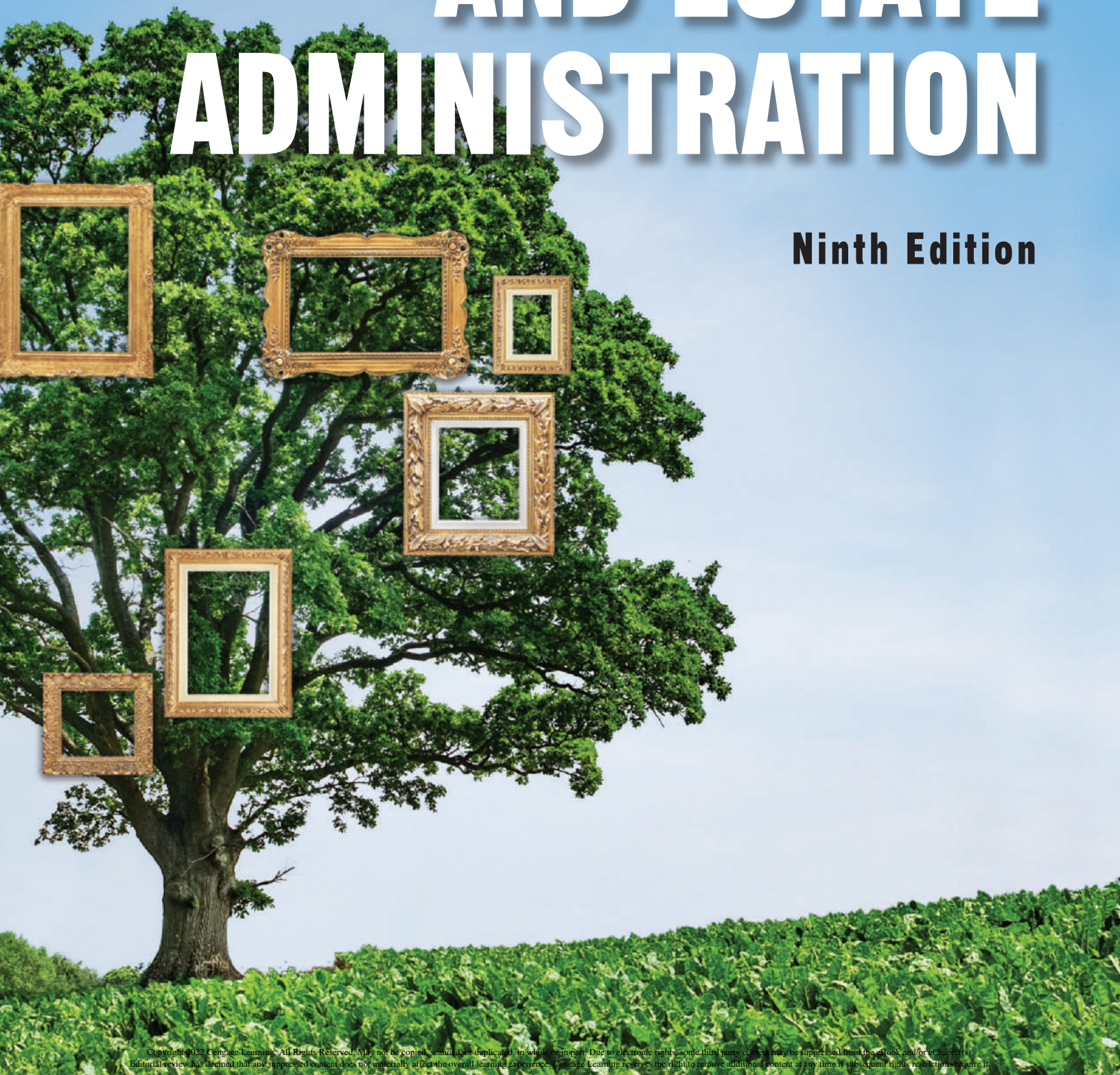




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WILLS, TRUSTS, AND ESTATE ADMINISTRATION

Ninth Edition

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To my husband, children, and granddaughters: You are undeniably my greatest assets! I am wealthy because of what you each bring to my life.

–JW

To my sweetest girls: You are the greatest gift I've ever known. May you always be inspired to be strong women and make the world a better place.

–EWF

CONTENTS

PREFACE

Over the past few decades, the performance of qualified and competent paralegals has raised their status as legal professionals. The economic benefits paralegals bring both to their employers (supervising attorneys) and to the firm's clients have proven their need and value. Therefore, it is no surprise that their vocation has grown rapidly. Although the current national market for paralegals remains strong, it will be competitive. Students who choose quality programs for their education and certification will have the best employment opportunities.

The goal of *Wills, Trusts, and Estate Administration* is to continue to provide a textbook that explains the basic, practical, everyday duties of a paralegal in the fields of law and prepares paralegals, such as yourself, to confidently undertake and successfully accomplish these tasks. After using the text and obtaining work experience, you will attain the level of competence that will enable you to perform your work with confidence and continue the success and uphold the standards that your profession demands.

The text is written primarily for paralegals, but others, such as trustees and personal representatives appointed to administer the estate of a deceased person, may find it useful. The text identifies the responsibilities and duties that a paralegal can perform under the supervision of an attorney when drafting a will or trust or assisting with the administration of a decedent's estate. The text provides a review of the terminology and general principles of law that are the bases for drafting wills and trusts, or planning and administering an estate, and identifies the participants and the duties they must perform in these legal areas. New material has been included to update the discussion of inheritance rights for same-sex couples, estate tax changes, disposition of digital assets, partition of heirs property, electronic wills, and special needs trusts. A chronological treatment of the step-by-step procedures required to complete the will and trust drafts and the administration of a decedent's estate is presented, including sample drafts and the executed forms needed to administer the estate. Current federal and state tax information and the appropriate tax forms are also discussed.

CHAPTER ORGANIZATION

To help students obtain confidence and proficiency, each chapter of the ninth edition contains the following features.

- *Objectives*. The objectives focus students on what they will learn upon completion of the chapter.
- *Scope of the Chapter*. The scope identifies and lists, in order, the topics to be discussed within the chapter.
- *Terminology*. Key terms are printed in boldface type and are defined in the margin at their first appearance. Key terms are also listed at the end of each chapter and defined in a comprehensive end-of-text glossary.
- *Examples, hypothetical situations, sample state statutes, legal forms, exhibits, checklists, drafted documents, and actual cases*. These are interspersed throughout the chapters to help students understand the concepts and procedures discussed.
- *Assignments*. Frequent assignments within the chapters require students to apply the chapter's legal concepts or to perform tasks required of a practicing paralegal.
- *Checklists*. Checklists that collect relevant client data and information are included in the text; "What You Do" lists and "You Must" notations in the Estate Administration chapter emphasize and clarify the actual procedures and specific tasks that the paralegal student must master to attain confidence and competency.
- *Ethical Issues*. Found throughout the text, these issues call attention to important ethical concerns that are relevant to the procedures discussed within the individual chapters.
- *Review Questions*. Review questions are included at the end of each chapter and have been revised to correspond to the content changes within the chapters.
- *Case Problems*. Actual cases and hypothetical problems are included at the end of the chapters to enable students to verify what they have learned and apply it to a specific problem or task discussed in the chapter.
- *Points of Interest*. Real-life contemporary cases or issues are included to enhance student understanding.
- *Practical Assignments*. Additional practical assignments have been added to the end of chapters to provide students with more hands-on skills that are required in the law office. Many incorporate the Internet as a research tool so that students can familiarize themselves with situations they will encounter as a practicing paralegal.

CHANGES IN THE NINTH EDITION

- *New legal topics*. The ninth edition includes a discussion of electronic wills, partition of heirs property, tax changes, and special needs trusts. It also includes updated information on the disposition of digital assets. This topic continues to be overlooked by many practitioners in estate planning and administration despite the prolific use of social media, email, and digital accounts. Sample updated forms addressing these issues have been included.
- *Reorganization of chapters*. Chapters have been reorganized to match the order in which a paralegal instructor is more likely to cover the materials. A student must understand the basic concepts of property before being able to determine what one would include in an estate. Once we have completed the discussion of estate administration and taxation of the estate, the focus switches to trusts and their classifications. The ninth edition concludes with estate planning and issues regarding long-term care.
- *Statutes*. State statutes that identify the variations in state laws and emphasize the need for paralegals to master the statutes of the state in which they live and practice have been added or updated.
- *State-by-state charts*. All charts have been updated where appropriate.
- *Legal forms*. Legal forms have been updated within the chapters, and essential newly executed estate administration forms, including selected tax forms, are included in Appendix A.
- *Surviving spouse*. The definition has been expanded and a discussion added to reflect changes in state laws as they apply to same-sex conjugal couples; new information includes a state chart.
- *Checklists*. The checklists used for collecting data and information for drafting wills, trusts, or an estate plan have been revised where necessary.
- *Tax laws*. The information in Chapter 11, including all pertinent charts, has been updated to reflect current tax regulations.
- *Uniform Probate Code*. The Uniform Probate Code is available at law libraries and online; state versions can also be accessed online.
- *Points of Interest*. Information regarding current issues and cases has been added to allow the student to reflect on real-life situations and how they might affect an estate practice.
- *Practical Assignments*. More practical assignments have been added to increase the marketability of the student.

SUPPLEMENTAL TEACHING AND LEARNING MATERIALS

Instructor Companion Site

Additional instructor resources for this product are available online. Instructor assets include an Instructor's Manual, Educator's Guide, PowerPoint® slides, and a test bank powered by Cognero®. Sign up or sign in at www.cengage.com to search for and access this product and its online resources.

Instructor's Manual and Test Bank

The **Instructor's Manual and Test Bank** have been greatly expanded to incorporate changes in the text and to provide comprehensive teaching support. They include the following:

- Chapter overviews
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- Answers to text questions
- Test bank and answer key

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Customizable Microsoft PowerPoint® Presentations focus on key points for each chapter. (Microsoft PowerPoint® is a registered trademark of the Microsoft Corporation.)

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ACKNOWLEDGMENTS

The authors would like to thank product manager Abbie Schultheis, associate content manager Emily Olsen, and learning designer Mara Vuillaume for trusting in us to complete this ninth edition revision of *Wills, Trusts, and Estate Administration*. The process has been time-consuming and challenging, but their insight and guidance have been invaluable. Additional thanks go to the reviewers of the text for their suggestions and for ensuring that we stay current!

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CHAPTER 1

The Estate Plan and the Purpose and Need for a Will

CHAPTER OUTLINE

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:

- Explain the need for and purpose of an estate plan and the procedures and documents used to create a plan.
- Explain the reasons why many Americans die without a will.
- Identify the basic terminology of wills and trusts.
- Explain the function and purpose of wills.
- Identify and contrast the procedures and outcomes when property is passed by testacy versus intestacy.
- Recognize the terms used to identify the persons who make, manage, administer, or benefit from wills, trusts, and a deceased person's estate.
- Identify the functions of fiduciaries including guardians, conservators, trustees, and personal representatives.
- Identify examples of instances where a person may not need a will.
- Summarize the requirements for a legal will.

SCOPE OF THE CHAPTER

Estate law is a branch of law that concerns a person's estate—one's real and personal property. Through estate planning, one can make decisions and issue directives about their assets both during their lifetime and after. This chapter begins with a general discussion on the need for an estate plan and the legal documents, (e.g., wills and trusts) required for its creation. Basically, making an estate plan in advance of one's death allows one to identify who should receive their property, who will manage it during the process, and who should be guardian of their minor children, all while minimizing potential tax consequences. In the following chapter, there is a discussion of what constitutes property. After a brief explanation of the reasons people in this country die without wills, the terminology associated with the law of wills, trusts, and estate administration is introduced as you begin the process of mastering the terms and legal concepts essential to the practice of law in these areas. A discussion of the purpose and use of wills and the necessity of having a will, also called a **testament**, concludes this chapter.

testament
Another name for a will.

THE ESTATE PLAN

Estate planning is the determination and use of a method to accumulate, manage, and dispose of real and personal property by the owner of the property during life and after death and to minimize the income, gift, inheritance, and estate taxes due. The purpose of estate planning is to identify, preserve, and increase the assets owned and provide for distribution of these assets, with the least possible tax expense, to family members and institutions the owner wishes to benefit. If estate planning is properly performed, the intent and desires of the owner will be accomplished, and the beneficiary-recipients (primarily family) will receive the maximum benefit and enjoyment of the property.

Unfortunately, most people are so involved in their daily activities that they give little thought to the consequences of their deaths. As people grow older, they do give thought to their mortality. Many realize the importance of making an estate plan, which can include purchasing life insurance to protect their dependents. However, people often die prematurely and fail to provide through a valid will or an appropriate trust for those for whom they care. The consequences of these acts of procrastination can be financially devastating.

The following chapters in this book explain in detail how to categorize property and ways you can assist in the creation and use of trusts and wills to resolve and avoid unfortunate consequences. It is also important that you are prepared to assist those who have the responsibility for estate planning and administration, i.e., your supervising attorney and the personal representative of the decedent's estate.

In addition to the attorney, numerous other individuals are qualified to give estate planning advice. They include trust officers from banks and trust companies, accountants, investment advisers, financial planners, and life insurance agents. Acting as a team, many of these advisers will take an active role in the development of an appropriate estate plan for each client. The attorney you assist will give advice on legal matters, the accountant will handle tax concerns, the financial planner will advise on investments, and the life insurance agent may play a key role in the formation of an insurance policy to ensure financial security for the client's family. While you assist these estate planners, your tasks will be to gather information, maintain records, and communicate by phone or letters to update and keep the client and planners informed of the plan's progress. ***Such tasks require you to neither divulge confidential information nor submit or propose unauthorized legal advice even in response to a specific request.***

⚖ ETHICAL ISSUE

POINT OF INTEREST

Estate Planning Advice Is Everywhere!

Advertisements for estate planning tips and asset protection tools flourish on the Internet. Television commercials are common for mutual funds and related products. More and more insurance agents and stockbrokers are presenting investment/estate planning seminars. Seniors are not the only target market. Presentations are made in the workplace, to civic groups, at business expos—really, just about everywhere. In our wealthy country, there are many companies that wish to influence how Americans spend and invest their money. Some nonlawyers may have given legal advice to clients; therefore, clients may need to be reminded that legal advice comes from attorneys. Other investment and retirement planning advice needs to come from the appropriate professionals.

Everyone who lives a normal life span accumulates assets they want to transfer after death. Real estate, cash, art, jewelry, securities, business ownership, boats, planes, antiques, profit-sharing plans, pension plans, life insurance, IRAs, 401(k) plans, Social Security, and

other employment and government benefit plans are a few examples of the wide variety of assets frequently acquired during one's life. The total value of the property items that form an individual's estate can be considerable and may be much larger than initially anticipated; e.g., the value of an appreciated home and other unencumbered real estate, sizable pension plans, and often the proceeds of life insurance policies alone may add substantially to the estate.

These assets and their value create a need to formulate a sound and appropriate financial plan—called an **estate plan**. The estate plan is an arrangement of a person's estate that takes into account the laws of wills, property, trusts, insurance, and taxes in order to gain maximum financial benefit of all these laws for the **disposition** (distribution) of the property during life and after death. If the plan is properly formed and executed, it should produce the best possible economic security for the individual and the family. The estate plan encompasses the creation of the estate, its maximum growth and conservation, and, ultimately, its distribution. It necessitates active planning strategies during the individual's life and important postmortem decisions after death. If designed appropriately, the estate plan should meet all the individual's objectives and provide (1) a comfortable retirement income; (2) financial protection for the family; (3) proper custodial care if incompetency or any serious physical or other mental health problem occurs; (4) a minimum of taxes and expenses throughout the implementation of the plan; and (5) expedient, efficient, and harmonious distribution of the estate according to the individual's wishes after death.

estate plan
An arrangement of a person's estate using the laws of various disciplines (e.g., wills, trusts, taxes, insurance, and property,) to gain maximum financial benefit of all the laws for the disposition of a person's assets during life and after death.

disposition
The distribution, transfer, or conveyance of property.

The development of an estate plan for the client commences once the client reaches a "comfort level" with the supervising attorney and paralegal, which allows the paralegal to accumulate the personal and financial data.

After information has been obtained from interviews and questionnaires and reviewed with the client, an estate plan is created using legal documents, (e.g., wills and trusts), and devices that save estate tax either by an increase in the deductions from the gross estate or by reducing the gross estate itself.

The next sections discuss the role the will plays in the development of an estate plan.

AN INTRODUCTION TO WILLS

Unfortunately, many people in the United States die without a valid **will**—the written declaration of a person's intended distribution of property after death. The result is they have no say in the way property they have accumulated over a lifetime will pass after they die.

will
The legally enforceable written declaration of a person's intended distribution of property after death.

Most young adults (those over 18) have few possessions, and dying is not their everyday concern. Correspondingly, in their view, neither is the need for a will. However, every adult owns some property, and most individuals want to determine to whom this property will be distributed after they die. Why then do so many people fail to make a will?

In the first place, almost everyone under 18 and adults who have a mental deficiency cannot make a will because legally they are either too young or they lack the mental health (sanity) required to create a valid will. Currently, financial planners nationwide recommend that individuals make a will as soon as they reach the age of majority, if only to give sentimental property to a favorite relative or friend. Some people fail to make a will because they are reluctant to discuss their property and finances with "strangers"; others procrastinate and then die prematurely due to an accident or unexpected illness; some do not want to discuss or face their mortality; others cite cost as their reason (although

attorneys generally charge minimal fees for preparing simple wills); and, finally, many people are aware that each state has laws that determine the passage of their property to family and blood relatives if they die without a will, so they allow their state to "make a will" for them. It seems no matter how much effort is spent to encourage Americans to make a will, many are not convinced or motivated to act.

POINT OF INTEREST

Oldest Known Will

In 1890, William Flinders Petrie, an English archaeologist, discovered the world's oldest last will and testament among the Egyptian pyramids. Written on a parchment/papyrus form, it was determined that the will was actually written in 1797 BC. Before this discovery, legal historians did not believe that any society had developed a legal mechanism that allowed for the distribution of one's assets upon their death but believed that the property automatically passed to the eldest living son. It is interesting to note that the will had witnesses.

Statutory Requirements for a Will

As mentioned, one reason why the young and some adults die without a will is that not everyone can legally make a will. To begin with, state laws impose restrictions on the makers of wills and on the procedures for creating a valid will. Through its legislature, every state passes laws, called **statutes**, that determine the **legal capacity** (age) and **testamentary capacity** (sanity) requirements for a person to make a will. The maker or **testator (male)/testatrix (female)** must be old enough (usually 18) and be of **sound mind** (sane) at the time the will is made.

statutes
Laws passed by state and federal legislatures.

legal capacity
Age at which a person acquires capacity to make a valid will, usually 18.

testamentary capacity
The sanity (sound mind) requirement for a person to make a valid will.

testator (male)/testatrix (female)
A man or a woman who makes and/or dies with a valid will.

sound mind
To have the mental ability to make a valid will. The normal condition of the human mind, not impaired by insanity or other mental disorders.

In the case of *Matter of Yett's Estate*, 44 Or.App. 709, 606 P.2d 1174 (1980), a will was challenged on the basis that the testator lacked testamentary capacity. The court held that to determine whether the maker of a will had testamentary capacity, great weight is accorded the testimony of attesting witnesses who were present at the execution of the will. It is the testatrix-decedent's capacity at that time, not her general condition over a span of time, that determines testamentary capacity. In this case, the evidence indicated she had this capacity even though she suffered from a malignant brain tumor. The court also ruled the evidence failed to establish her illness, i.e., the tumor, had caused insane delusions that resulted in a decreased share of her estate

POINT OF INTEREST

How Will the Internet Affect Estate Planning?

Perhaps more Americans will consider the benefits of estate planning and preparing a will. Many estate planning services are prominently advertised on the Internet. Quizzes and self-tests can be taken on the Internet to ascertain if one needs a will. Many sites offer links to pages and/or sites that feature will writing, advantages of having a trust, minimizing estate taxes, and other related topics. Will this additional exposure to the topic of estate planning encourage more Americans to write a will? Only time will tell.

Caveat: Online access to information about wills, trusts, and estate planning is not a substitute for sound legal advice from a practicing attorney in your state.

passing to the contestant of the will. Consequently, the court ruled that the will was valid.

State statutes also establish formal requirements for the creation and **execution of a valid will**; e.g., most wills must be written, signed, and dated by the maker and attested and signed by two or three witnesses. To be properly executed, a will must conform to the laws of the state in which it is made. Each state enacts (passes) laws on the execution of wills, and these laws are not always the same. Laws differ on the method of writing that may be used (e.g., whether the will may be handwritten or **holographic**, typewritten, computer generated and printed, audiotaped, or videotaped) and on the placement of the testator's signature (e.g., whether it must be on every page, only at the end of the will, or simply anywhere on the will). Individuals who are unfamiliar with the laws of their state and try to create their own wills often make mistakes or omissions concerning their property, naming their **beneficiaries**, or attempting to satisfy the statutory requirements for a will. The result may be an unintended, incomplete, or invalid will. To become a well-trained and experienced paralegal, you need to learn and master the laws of your state so you can explain the statutory requirements, terminology, and procedures associated with wills and help clients execute a valid and meaningful will that accurately fulfills their intent and desires. ***However, always be careful not to provide legal advice!***

execution of a valid will
The acts of the testator who writes and signs the will and the two or more witnesses who attest and sign it to establish the will's validity.

holographic will
A completely handwritten, signed, and usually dated will that often requires no witnesses.

beneficiary
A person who is entitled to receive property under a will or to whom the decedent's property is given or distributed.

⚖ ETHICAL ISSUE

Basic Terminology Related to Wills

Before proceeding further, it will be helpful to present some basic terminology related to wills and estates. Exhibit 1.1 explains the terms used to indicate whether a person died with or without a valid will.

The following terms relate to the actual making of a will.

- *Execute.* To perform or complete, i.e., to write and sign a will.
- *Attest.* To bear witness; to affirm or verify as genuine (e.g., the witness who attests the testator's intent, capacity, and signature on a will).
- *Subscribe.* To sign one's name generally at the end of a will.
- *Witnesses.* Two or more persons who attest and subscribe (sign) the will.

EXHIBIT 1.1 Testacy versus Intestacy

Decedent
(the deceased or person who dies)

With a valid will	*Without a valid will*
• Testacy. Death with a valid will. • Testate. Any person who makes and/or dies with a valid will. The decedent's property is distributed to beneficiaries and devisees. • Testator. A man who makes and/or dies with a valid will. • Testatrix. A woman who makes and/or dies with a valid will.	• Intestacy. Death without a valid will. • Intestate. Any person who dies without a valid will. The decedent's property passes to heirs according to state laws called intestate succession statutes.

Note: Today, common practice often uses the term *testator* for both sexes. In most cases, this text will refer to any person (man or woman) who makes and dies with a valid will as a *testator.*

Other important terms relate to the administration of the decedent's estate.

- *Estate.* Also called *gross estate.* The property accumulated during a person's lifetime and owned at the time of death.
- *Property.* Anything subject to ownership; classified as real property or personal property.
  - *Real property.* Land, buildings, and things permanently attached to them.
  - *Personal property.* Any property that is not real property.
- *Estate administration.* The process of appointing a personal representative (executor or administrator) to collect, preserve, manage, and inventory the decedent's estate; notifying creditors to present their claims; paying all the decedent's debts and death taxes due; and distributing the remaining estate property to beneficiaries named in the will or heirs according to state law if the decedent died intestate, i.e., without a will.
- *Probate.* Court procedure by which a will is proved to be valid or invalid. Probate has been expanded to include the legal process of the administration of a decedent's estate. The term is often used synonymously with estate administration. For example, the phrase "to avoid probate" means to avoid the process and procedures of estate administration. The probate process is required to legally establish the beneficiary's or heir's title to a decedent's property. The **formal probate** (estate administration) or **informal probate** is performed by the personal representative (e.g., executor or administrator) of the estate under the supervision of the appropriate court, often called the probate court.

formal probate
A court-supervised administration of a decedent's estate.

informal probate
A court proceeding of a decedent's estate with limited or no court supervision.

- *Probate court.* The general name for the court that has jurisdiction (authority) over the handling or administration of a decedent's estate and the distribution of the property; also may be called chancery, surrogate, or orphans' court, depending on the state.
- *Personal representative.* The individual who is appointed by the probate court to manage the estate of the decedent and either distribute the estate assets according to a will or a state's intestate succession statute when there is no will. A personal representative includes the following:
  - *Executor/executrix. The man or woman named in the will to carry out its provisions, i.e., administer the decedent's estate.*
  - *Administrator/administratrix. The man or woman appointed by the probate court to administer the decedent's estate when there is no will.*

Other specialized types and titles of personal representatives are discussed in Chapters 7 and 8.

The following terms are used to refer to the recipients of the decedent's property.

Will Terms

- *Beneficiary.* Traditionally, a beneficiary is a person who is entitled to receive property under a will or a person who has already received the property. Under common law, a beneficiary received the personal property of the decedent by will, but today, the term is used to describe a person entitled to any gift (real or personal property) under a will. Therefore, a beneficiary can include a devisee or legatee. This definition for beneficiary will be used throughout the text.
- *Devisee.* A person who receives a gift of real property under a will; or as defined by the **Uniform Probate Code (UPC)**, the person who receives

Uniform Probate Code (UPC)
A uniform law available for adoption by the states to modernize and improve the efficiency of the administration of a decedent's estate.

a gift of either real or personal property. Throughout the chapters of the book, relevant sections of the Uniform Probate Code will be cited.

- *Legatee.* A person who receives a gift of personal property under a will.

Intestate Terms

- *Heir.* Under common law, an heir was a person entitled by statute to receive the real property of a decedent who died intestate. Today, an heir includes persons who are entitled by statute to receive or have already received any gift (real or personal property) of the intestate. In addition, although technically incorrect, the popular use of the word *heir* has also been expanded to include persons who receive any gift through a decedent's will. However, throughout the text, the term *heir* will include persons who receive any gifts by intestate succession statutes. See comparison chart on terminology, Exhibit 3.1.
- *Distributee.* A person who is entitled to share in the distribution of an estate of a decedent who dies intestate, or as defined by the UPC, any person who has received property of a decedent from the personal representative other than a creditor or purchaser.
- *Next of kin.* The nearest blood relatives of the decedent; or those who would inherit from a decedent who died intestate, whether or not they are blood relatives (e.g., a spouse).

THE PURPOSE OF WILLS

The primary function of a will is to allow individuals to distribute their property any way they choose. A will gives the testator the opportunity to accurately describe the property owned at death and to designate to whom that property is to be distributed. Because **probate courts** (see Exhibit 7.2) closely scrutinize the language of the will to determine the testator's true intent, it is of paramount importance that no word or sentence within the will create a contradiction, ambiguity, or mistaken interpretation that could cause confusion that would change the testator's plan or, worse, invalidate the will.

probate court
The court that has jurisdiction (authority) over the probate of wills and the administration of the decedent's estate.

> **EXAMPLE:** In an early provision of her handwritten will, Selena Parker leaves "all my antique furniture to my best friend, Maeve Thompson." Later in the will, Selena states that she wants the furniture to go to her only daughter, Carissa. In the final clause of the will, she selects five pieces of this furniture to be given to her housekeeper. The court could declare the will invalid because of these and other contradictions.

Since the context of the general language and particular words in a will is a major factor used to determine the testator's intent, it is essential the will be carefully constructed to ensure the testator's plan for the distribution of the estate property is clearly understood. The court in the case of *Richland Trust Co. v. Becvar*, 44 Ohio St.2d 219, 339 N.E.2d 830 (1975) stated, "The function of the court in a will construction case is to determine and apply the testatrix's intention, as expressed in the language of the whole will, read in the light of the circumstances surrounding its execution."

Without a will, the statutes of the decedent's **domicile** (home state) will determine to whom the decedent's property will be distributed with the exception that **real property**, i.e., land, buildings (house, cottage, apartment, or office building), and the like, will be distributed according to the laws of the state in which the property is located. One of your major tasks and responsibilities will be

domicile
The location (state) of a person's true and legal home.

real property
Land, buildings, and things permanently attached to them.

ETHICAL ISSUE

to prepare drafts of the will and review them carefully with the client ***to ensure that the final draft contains complete, accurate, and clearly understandable language to enable readers, especially the probate court, to agree on the meaning of the will and the client's intent.***

ambulatory
Subject to change and revocation anytime before death; e.g., a will is ambulatory.

Since all wills are **ambulatory**, i.e., subject to change and revocation anytime before death, a will takes effect only after the testator dies. While living, the testator can review and modify the will whenever he wishes by the addition, deletion, or modification of gifts, beneficiaries, clauses of the will, or fiduciaries (see further discussion below under Appointment of Fiduciaries). Also, the testator can sell or dispose of any property listed in the will before death. In the past, if the modification was a simple change (e.g., adding a new gift), a **codicil** or amendment to the will was sufficient. Today, codicils have become obsolete. With the change from typewriter to word-processing software, which rapidly and easily produces legal documents, a "new will" is the preferred and more appropriate choice for *any* needed modification. Also, the use of a computer-generated and printed new will eliminates the serious potential problem of locating two or more documents, i.e., a will and multiple codicils. For further discussion, see Chapter 4.

codicil
A written amendment to the will that changes but does not invalidate it.

In no particular order of importance, the next paragraphs discuss the testator's essential letter of instructions and some of the reasons for making a will.

Funeral and Burial Plans and the Letter of Instructions

letter of instructions
A document that specifies the testator's instructions for organ donation and funeral and burial plans. It can also be an all-inclusive checklist of various personal and estate information to help the family and personal representative locate and identify property and documents necessary to administer the estate.

The best and most appropriate method for individuals who preplan their funeral and burial arrangements is to include the plans in a **letter of instructions** and *not* in a will or codicil. One of the valuable uses of the letter of instructions is to provide a written document that identifies and explains a person's funeral and burial plans and is readily accessible for the testator's review and modification. After planning the funeral with a mortician (including costs and arrangements for a casket, church service, and reception) and purchasing a burial plot, individuals can insert these plans into the letter of instructions and make them known to their family, physician, religious adviser, and future personal representative by giving them copies of the letter. Thus, the letter avoids a frequently unpleasant, and sometimes painful, problem the family faces when a loved one dies, often suddenly and unexpectedly, and the will or codicil cannot be found or obtained before the decedent-testator's burial. The letter should not be kept in a safe deposit box. A good place to retain one's important documents is in a fireproof safe.

Preplanning and prepaying the costs of the funeral and burial takes a heavy burden off the grieving family, both economically and emotionally. Alternately, if the individuals prefer to be cremated and want to ensure that their wishes will be followed without revealing the contents of the will, they can review the letter containing the cremation plans with family members; if there are any concerns or objections, they can be resolved prior to the person's death.

Unfortunately, if a testator places funeral and burial arrangements only in the will, all such preplanning may be an exercise in futility, either because the will is not found until after the testator has been buried, or because the family simply disregards or disobeys the instructions. Since statutes in most states allow the desires of a surviving spouse and next of kin to legally supersede the plans of the testator, often the family makes the final decisions concerning the disposal of the testator's body and the type of funeral or service. The following persons generally have priority in deciding on funeral and burial arrangements including cremation: the **surviving spouse**, an adult child, a parent, an adult sibling, the decedent's guardian, and any other authorized or obligated person (e.g., a personal representative or medical examiner). All too frequently, serious disagreements arise over such questions as whether there should be a burial of the body or cremation, a denominational or nondenominational religious service, an open or closed casket, and the like.

surviving spouse
A spouse who outlives the other.

EXAMPLE: Nathan has told his family he wants to be cremated when he dies. After his death, Nathan's family, for religious reasons, decides to have a traditional service without cremation. Often the decedent's wishes are not followed, as in this example.

Sometimes the testator's family disregards the funeral plans outlined in the will because the arrangements are too elaborate, too expensive, or unreasonable.

EXAMPLES: Xavier wants to be cremated and have his ashes flown to Paris and spread from the top of the Eiffel Tower. Anthony wants a horse-drawn carriage, 100-member band, and all-night party. Honoring such requests may deplete the estate and create additional hardships for survivors.

The above problems can best be alleviated by preplanning and prepaying the funeral and burial arrangements, discussing them with family and the funeral director, and placing them in the letter of instructions. *Caveat:* Copies of the letter must be given to the family and the future personal representative.

Even though the funeral and burial arrangements are often made by someone other than the personal representative (such as a surviving spouse or other family member), the cost of all "reasonable" expenses is paid as a priority debt of the decedent's estate according to state law, as will be discussed in detail in later chapters. It will be your job to keep accurate records of the costs and ***remind the personal representative that these expenses remain "reasonable."*** Personal representatives are liable to the estate if they allow these costs to become excessive due to their neglect.

⚖ ETHICAL ISSUE

If an individual intends to donate organs or remains for transplant or medical research, the donation instructions must also be included in the letter instead of a will, which may not be discovered in time to make a "useful" organ donation. Although most states recognize donor designation on a driver's license or other organ donor documentation, it may not be enough, as many organ procurement organizations and hospitals continue to seek consent from the donor's next of kin. Some states have passed legislation that seeks to avoid complications arising from a donor's next of kin opposing the organ donation. These laws generally provide that a properly executed organ donation statement, not revoked by the donor, must be enforced and cannot be overridden by any other person. Minn. Stat. Ann. § 525.9212(2) (h) is typical, providing that, upon the donor's death, an unrevoked organ donation designation is enforced and does not require the approval of, nor can it be opposed by, any other person. Even in states that call for such protection of the donor's wishes, it may still be advisable to inform the family to ensure the donor's wishes will be honored. Many states have established organ donor registries. For the most part, they are operated in participation with the Department of Motor Vehicles and provide for donor designation on the driver's license. For further discussion of funeral and burial arrangements and organ donation by the testator, see Chapter 6.

ASSIGNMENT 1.1

1. Does your state have an organ, tissue, and eye donor registry?
2. Does your state provide for donor designation on the driver's license?
3. Is online registration available for your state's donor program?
4. What policy does your state have in place for informed consent to organ donation?
5. Does your state have legislation requiring that the organ donor's wishes be carried out?

The letter of instructions is potentially a multipurpose document but is not legally enforceable. It is, therefore, not a substitute for a will. The letter's purpose can range from a document limited to funeral and burial plans, to an all-inclusive checklist that identifies the testator's personal and family history; assets and liabilities, including digital assets; various insurance policies; financial advisers; health and service providers; location of legal and personal documents; and many other matters. A checklist may be drafted from a list such as that shown in Exhibit 1.2. The subject matter list enables testators to select and create appropriate schedules for their personal letter of instructions.

EXAMPLE: A sample schedule in the letter of instructions containing assets such as pension/retirement plans of the testator might appear as follows.

Pension/Retirement Plans **Date** _____

Plan	*Location Home safe/ File cabinet*	*Designated beneficiary*	*Present value*
1. IRA—Traditional/Roth			
2. Self-Employed Retirement Plan			
3. 401(k) Plan—Traditional/Roth			
4. Profit-Sharing Plan			
5. Pension Plan			
6. Stock Bonus Plan/ESOP			
7. Other			

EXAMPLE: Another common schedule identifies insurance policies.

Insurance Policies **Date** _____

Type	*Location Home safe/ File cabinet*	*Insurer*	*Policy number*
1. Life			
2. Health			
3. Accident			
4. Disability			
5. Homeowners			
6. Automobile			
7. Umbrella			
8. Other			

A third potential schedule could include a list of securities (stocks and bonds) within the letter of instructions to enable the investor to review and regularly update the entries so that necessary changes (e.g., number of shares, date acquired, purchase price, date sold, sales price, and stockbroker), can be made.

EXHIBIT 1.2 Letter of Instructions—Subject Matter

Personal Information
- Name/ (a/k/a)
- Address
- Prior Residences (Past 10 Years)
- Telephone Number (Home/Work)
- Date/Place of Birth (Certificate)
- Social Security Number
- Religion
- Date of Marriage (Certificate)
- Date of Divorce (Decree)
- Education
- Employment History
- Military Record
- Other

Organ Donation/Funeral Plan
- Organ Donation
  - Donor Card
  - Driver's License Provision
  - Registry
  - Health Care Directive
- Body Donation
- Funeral Plan
  - Prepaid Funeral/Burial Contract
  - Funeral Service
  - Burial/Cemetery Plot
- Other

Family Information
- Relationship (Spouse, Children, Grandchildren, etc.)
- Name
- Address
- Telephone Number (Home/Work)
- Date/Place of Birth
- Marital Status
- Date of Death
- Other

Fiduciaries
- Personal Representative
  - Successor
- Guardian (Minor or Incapacitated Persons)
  - Personal Guardian
  - Property Guardian
  - Conservator
  - Successor
- Trustee
  - Successor
- Other

Family Financial Advisers
- Accountant/Tax Adviser
- Appraiser
- Attorney
- Banker/Trust Officer
- Financial Planner
- Insurance Agent (Broker)
- Real Estate Agent (Broker)
- Stockbroker
- Other

Liabilities
- Automobile Loan
- Business Debts
- Charge Accounts
- Contract for Deed Payments
- Credit Card Charges
- Installment Purchases
- Loans on Insurance Policies
- Mortgages on Real Property
- Pledges to Charities, Religious Organizations, etc.
- Promissory Notes
- Taxes
- Other

Assets
- Automobile, Boat, etc.
- Bank Accounts
- Business (Family) Ownership
- Furniture/Household Goods
- Notes, Contracts for Deed, etc.
- Pension/Retirement Plans
- Real Property
- Royalties/Patents & Copyrights
- Securities
- Trusts
- Other

Additional Topics
- Credit Cards
- Insurance Policies
- Legal & Personal Documents
- Location of Documents
- Medical & Dental Providers
- Service Personnel
- Spiritual Advisers
- Safe Deposit Box
- Tax Returns
- Other

Digital Assets (logins and passwords)
- Computer Hardware
- Electronic Communications
- Online Reward Programs
- Financial Accounts
- Domain Names
- Intellectual Property
- Digital Collections
- Business Accounts
- Cryptocurrencies

If the letter is on a computer, assets such as securities can be evaluated daily for future investment strategies.

Another potential schedule should include a complete inventory of all digital accounts and assets, including usernames and passwords. It is important to keep this document up-to-date, as account information changes frequently (especially passwords). Family members do not need to know the details of the inventory but should receive instructions so they know how to access the inventory when necessary.

By keeping the letter of instructions current and distributing copies to family members to inform them of its contents, especially funeral, burial, and organ donation plans, the letter becomes the ideal method for the documentation of this information in place of a will or codicil. Most importantly, it allows the testator's organ donation and funeral plans to be implemented when time is of the essence.

Apportionment for Death Taxes

apportionment clause
A clause in a will that allocates the tax burden among the residuary estate and the beneficiaries of the will.

By adding an appropriate **apportionment clause** to the will, the testator can determine the source from which death taxes (federal and state estate taxes and state inheritance taxes) will be paid. If the apportionment clause is explicit and included in the will, it determines the method of apportionment. However, if the will has no apportionment clause or is ambiguous, the statute of the testator's domicile determines the method of apportionment. The following is an example of an apportionment clause from West's McKinney's Forms, ESP, § 7:387.

> *I direct that all estate, inheritance, succession and transfer taxes and other death duties, including any interest or penalties thereon, imposed or payable by reason of my death upon or in respect of any property passing under my will and required to be included in my gross estate for the purpose of such taxes, shall be paid out of my residuary estate as an administration expense and shall not be apportioned. Source: Thomson/West from West's* McKinney's Forms.

residuary estate
The remaining assets (residue) of the decedent's estate after all debts have been paid and all other gifts in the will are distributed.

legatee
A person who receives a gift of personal property under a will.

pro rata
According to a certain rate or percentage.

Many states place the burden of estate and inheritance taxes on the **residuary estate** of the will, which is also the source of payment of creditors' claims. Other states apportion federal and state death taxes among the various persons (**legatees** or beneficiaries) on a **pro rata** basis (see N.Y. EPTL § 2–1.8).

The advantage of having the testator make the apportionment decision rather than leaving it to state law is that customarily the property included in the will's residue clause, often a substantial portion of the estate, is left to the surviving spouse and children. If this property is the primary or sole source of payment of creditors' claims and death taxes, *these family members may be unintentionally placed in a hardship situation by this major oversight.* It is your responsibility to recognize this mistake and bring it to your supervising attorney's attention. The attorney will explain its significance to the client and obtain permission for you to redraft appropriate provisions of the will for the attorney's approval.

The Uniform Estate Tax Apportionment Act of 2003, which apportions federal and state death taxes among all beneficiaries on a pro rata basis, has been adopted in some states and is incorporated in the UPC § 3–916. *Remember:* An apportionment clause in a will overrules any apportionment method established by state statute.

Property Distributions

With a will, the testator can avoid many ill-advised and awkward property distributions. Consider the following example.

EXAMPLE: Jacob Weizman dies intestate. His only heirs are five unmarried daughters. Jacob's estate assets consist of three farms (each farm is located in Jacob's home state (domicile) and is worth $200,000) and a total of $100,000 in various banks. Jacob's state statute, like the law in most states, divides his assets equally among his five daughters. Dividing the money is easy—each daughter receives $20,000. The three farms, however, go to the five daughters in the form of co-ownership called **tenancy in common**, which creates for each co-owner (each daughter) an undivided, equal interest in each farm and the right to equal possession of the entire premises of each farm. As a **tenant in common**, each daughter, on her death, can pass her $20,000 and her equal interest (one-fifth) in each farm to the beneficiaries she names in her will; if she dies intestate, the law of the state where the farms are located will determine who receives her one-fifth interest and her $20,000.

tenancy in common
The ownership of an undivided interest of real or personal property by two or more persons without the right of survivorship, which allows each owner's interest to be passed to their beneficiaries or heirs upon death.

tenant in common
One of two or more persons who own property in a tenancy in common.

This situation becomes more complicated if, for example, two of the daughters want to live on one of the farms; the others want to sell them; or one or more of the daughters marry. The point is clear: Even if serious personality conflicts do not occur, the occupation and management problems of the property could create numerous and unfortunate consequences. This unpleasant situation is avoided if Jacob discusses his assets with his daughters, so that, as a family, they identify possible options and arrive at a compromise acceptable to all. In this way, Jacob's original plan to treat the daughters fairly is accomplished harmoniously, and the solution could be included in his will.

ASSIGNMENT 1.2

Review the facts in the Jacob Weizman example above. Draw up three different plans that may be used as part of Jacob's will to transfer the three farms and the $100,000 to his five daughters in equal shares.

Provisions for Family Members

With a will, the testator can appropriately provide for a surviving spouse and the special needs of individual children. In most cases, the surviving spouse receives the majority of the testator's estate. If the testator's estate plan includes lifetime gifts and specific provisions in wills and trusts, death taxes, especially federal and state estate taxes, can be reduced, thereby maximizing the portion of the estate family members receive. These tax reductions may be lost if the decedent dies intestate. For a complete discussion of these problems and tax concerns, see Chapter 14.

When a spouse and minor children survive a decedent who failed to make a will, the **intestate succession statutes** of most states pass the estate property to the spouse individually, or for life, and to the children equally as tenants in common. Since the children are minors, a probate court needs to appoint a **guardian** (see Appointment of Fiduciaries on the next page) to handle any property in which they have an interest. In such a case, the surviving spouse is appointed guardian; however, the appointment may cause additional expense and needless delay if the property has to be sold promptly (e.g., to provide funds for the family's necessary living expenses or if the family needs to relocate). For this reason, it is often best to leave the decedent's estate solely or as a life estate to the surviving spouse without minor children becoming the co-owners. This can be accomplished using a will and/or a trust.

intestate succession statutes
Laws passed in each state establishing the manner in which a decedent's property will be distributed when death occurs without a valid will.

guardian
The person or institution named by the maker of a will or appointed by the court when there is no will to care for the person and/or property of a minor or a handicapped or incompetent person.

spouse's statutory, forced, or elective share
The spouse's statutory right to choose a share of the decedent spouse's estate instead of inheriting under the provisions of the decedent's will.

The only person a testator cannot disinherit is a surviving spouse since the spouse has a statutory right to a share of the decedent spouse's estate. This is called the surviving **spouse's statutory, forced, or elective share**. Every state has a statute with a provision for the benefit of the surviving spouse that makes it impossible for the deceased to leave the surviving spouse nothing. However, a decedent who dies testate can disinherit children. Of course, this happens at times, but more commonly, the testator wants the children to receive the estate equally. Due to special circumstances, the testator may grant unequal shares of the estate to meet the children's different needs (see the examples below).

EXAMPLES: In her will, Kristin Nielsen

1. *leaves the entire estate to her three children equally.*
2. *leaves the majority of the estate to her child with special needs and smaller shares to her other two children.*
3. *intentionally and specifically states that one, two, or all three of her children (naming them) are not to receive any assets of the estate.*

In the above examples, if the decedent, Kristin Nielsen, dies intestate, the children's special needs will not be met, but none of them will be disinherited. If the children are her only heirs, they will receive equal shares.

Numerous other problems concerning family members' inheritance rights are discussed in detail in Chapters 3 and 5.

ward
A minor or incompetent person placed under the care and supervision of a guardian by the probate court.

incompetent person
A person under legal disability (e.g., a mentally incapacitated person).

personal guardian
An individual or trust institution appointed by a court to take custody of and care for a minor or an incompetent person.

property guardian
An individual or trust institution appointed by a court to care for and manage the property of a minor or an incompetent person.

fiduciary
A person, such as a personal representative, guardian, conservator, or trustee, who is appointed to serve in a position of trust and confidence and controls and manages property exclusively for the benefit of others. By law, the fiduciary's conduct is held to the highest ethical standard.

heir
Traditionally, a person, including a spouse, who is entitled by statute to the real property of an intestate. Today, a person entitled to any gift (real or personal property) of the intestate or in the decedent's will.

fiduciary duty
A duty or responsibility required of a fiduciary to act solely for another's benefit that arises out of a position of loyalty and trust.

adoptive parent
A person who legally adopts another individual, usually a child.

Appointment of Fiduciaries: Guardians and Conservators

With a will, a testator can appoint guardians for a **ward** (minor or **incompetent person**). Guardians appointed by the court are either **personal guardians** or **property guardians**. Both guardians are a type of **fiduciary**, a person in a position of trust and confidence who controls and manages property exclusively for the benefit of others and owes the highest duty of obedience, diligence, and good faith to those the person represents. Fiduciaries include guardians who act for minors or incompetent persons, trustees who act for beneficiaries of a trust, and personal representatives who act for beneficiaries of a will or for **heirs** when there is no will. The fiduciary is required to give absolute loyalty to the beneficiary or minor while performing **fiduciary duties**, i.e., all transactions that concern the property held in trust.

A personal guardian is an adult who has custody, control, and responsibility for the care and supervision of the minor child until the child reaches the age of majority, usually 18. If the decedent-testator is survived by the other natural or **adoptive parent**, that parent by law immediately becomes the personal guardian of the minor. An attempt by the testator to appoint some other person as the minor's guardian is not valid or binding, see Tex. Prob. Code Ann. § 676(b). This situation frequently occurs when married couples divorce, and one of the former spouses is given custody of the minor children of the marriage. If the custodial spouse dies while the children are still minors, the attempt in a will to name a personal guardian who is not the other natural parent (the former spouse) would fail.

When there is no other surviving natural parent, the appointment of a personal guardian in the custodial parent's will is generally upheld by the court, and any further hearing on custody is unnecessary, see Mass. Gen. Laws Ann. ch. 201 § 3. The appointment of a personal guardian is discussed in detail with examples and cases in Chapters 6 and 9.

When parents die without a will or fail to appoint a guardian in a will, the probate court must select both a personal and a property guardian based on what is "in the best interests of the child." Godparents are not legal guardians.

Although they acknowledge responsibility to help raise a child by reason of a religious ceremony, they do not have legal standing, i.e., they are not recognized as having the legal authority of parents. Usually, the court appoints a family member who may or may not have been the choice of the decedent. Without a will, the appointment of a guardian can lead to a time-consuming and expensive contest in probate court between relatives. Unfortunately, the dispute often has lasting harmful effects on the children.

EXAMPLE: Tal Anderson dies intestate. Tal had often talked to Katherine and Joe Merrill, Tal's close friends, about his desire to have them "take care of my children if I should die." Even though Katherine and Joe inform the probate court of Tal's wishes and their willingness to be the guardians, the probate court will most likely appoint blood relatives of Tal who agree to be the guardians.

EXAMPLE: The only blood relative of Ana Herrera, age 27, is her grandmother, age 70. Due to her grandmother's age and uncertain health, Ana asked her close friend, Rosie Cooper, if she would be the guardian of Ana's 8-year-old daughter. Rosie agrees, but Ana dies intestate. The probate court will likely appoint the grandmother as guardian, if she is willing to serve, even though she was not Ana's choice.

Unlike the case of the personal guardian, the surviving natural or adoptive parent or the person appointed by the testator's will is not automatically appointed the property guardian for the decedent's minor or incompetent children. Such people may be appointed and often are, but the decision is made by the probate judge, who appoints the guardian.

The property guardian can be a natural person or a legal person, such as a corporation, bank, or trust department, which happens infrequently. The property guardian's responsibility is to take exclusive control of and manage the property inherited by a minor or incompetent person in order to preserve and increase its value. The guardian must perform the management and investment functions according to strict standards set by the court and state law. These standards cannot be changed, broadened, or made less rigid by the terms of a will even if that was the testator's intent.

A property guardian for an incompetent person whom the probate court has found to be incapable of managing property is, in a few states, called a **conservator**, another type of fiduciary. Typically, conservators are appointed for individuals who, due to advanced age or an illness such as Alzheimer's disease, are under a legal disability that makes them mentally incapable of managing their property. States usually require that a conservator or guardian be appointed whenever an incompetent person owns property obtained through gifts or inheritance. Property guardians or conservators are discussed further in Chapters 6 and 9.

Creation of Testamentary Trusts

A testator can create either a **testamentary trust**, i.e., a trust within the will, which becomes operational only after the testator's death, or an ***inter vivos* or living trust**, which takes effect immediately after the trust is created. A **trust** is a legal agreement in which one person (the **settlor**) transfers **legal title** (ownership) to one or more persons (the **trustee** or co-trustees) who, as a fiduciary, holds and manages the property for one or more **beneficiaries** who receive the **equitable title**, which gives them the right to the benefits of the trust. The settlor gives up possession, control, and ownership of the property to the trustee who is specifically instructed by the trust terms how the trust is to be managed

conservator
A fiduciary; an individual or trust institution appointed by a court to care for and manage property of an incompetent person.

testamentary trust
A trust created in a will. It becomes operational only after death.

***inter vivos* or living trust**
A trust created by a maker (settlor) during the maker's lifetime. It becomes operational immediately after the trust is created.

trust
A right of property, real or personal, held by one person (trustee) for the benefit of another (beneficiary).

settlor
A person who creates a trust; also called donor, grantor, creator, or trustor.

legal title [of a trust]
The form of ownership of trust property held by the trustee, giving the trustee the right to control and manage the property for another's benefit, i.e., the holder of the equitable title.

trustee
The person or institution named by the maker of a will or a settlor of a trust to administer property for the benefit of another (the beneficiary) according to provisions in a testamentary trust or an *inter vivos* trust.

beneficiary [of a trust]
The person or institution who holds equitable title and to whom the trustee distributes the income earned from the trust property and, depending on the terms of the trust, even the trust property itself.

equitable title [of a trust]
A right of the party who holds the equitable title or beneficial interest to the benefits of the trust.

and the trust property invested so that income produced (profits) can be distributed to the beneficiaries. All three positions (settlor, trustee, and beneficiary) can be held by the same person, but the fundamental characteristic of a trust is the trust splits title of the trust property into legal title (transferred to the trustee) and equitable title (given to the beneficiary), and requires that no one person can be the sole trustee and the sole beneficiary since that person would hold both titles, merging them and invalidating the attempt to create a trust. The solution to this problem is to have either co-trustees or co-beneficiaries so the "split title" requirement is satisfied.

EXAMPLES:

1. *A trust is not created if the settlor, Kevin Ford, names himself as both the sole trustee and the sole beneficiary.*
2. *A trust is created if the settlor, Kevin Ford, names himself sole trustee and Carly Hamilton and himself as co-beneficiaries.*
3. *A trust is created if the settlor, Kevin Ford, names Carly Hamilton and himself as co-trustees and himself as sole beneficiary.*

All trusts, whether testamentary or *inter vivos* (living), are either revocable or irrevocable. A revocable trust may be changed, amended, or canceled by the settlor while living, but, generally, revocable trusts become irrevocable when the settlor dies. Irrevocable trusts are final from the moment of their creation. They cannot be changed or revoked. *Caveat:* Unless the trust document contains a clause that expressly reserves the right or power of the settlor to revoke the trust, the trust is irrevocable. The significance and consequences of revocable or irrevocable trusts are discussed in Chapters 12 and 13. One of the most common uses of a testamentary trust is the **bypass trust** (also called Trust B of an A-B trust, credit shelter trust, family trust, and residuary trust) established for the benefit of a surviving spouse. By limiting the surviving spouse's right to a life estate in the **principal** of Trust B, the property is not included in the estate of the surviving spouse when that spouse dies; thus, it avoids **federal estate tax**. By reducing federal taxes in this manner, more of the estate property is free to pass to future beneficiaries, usually the children (see the detailed discussion in Chapter 14). If a person dies without a will (intestate), this tax advantage would be lost.

bypass trust
An estate planning device whereby a deceased spouse's estate passes to a trust as a life estate for the surviving spouse rather than entirely to the surviving spouse, thereby reducing the likelihood that the surviving spouse's estate will be subject to federal estate tax.

principal
In trust law, the capital or property of a trust, as opposed to the income, which is the product of the capital.

federal estate tax
A tax imposed on the transfer of property at death.

Another common reason for creating testamentary or *inter vivos* (living) trusts is to counter and avoid the rigid control and considerable expense of a property guardian for minors or a conservator for incompetent persons. The following examples illustrate the advantages of trusts.

EXAMPLE: In a trust, trustee Maurice Benson can be given discretion to choose among accumulating trust income, distributing **income**, or even distributing the principal of the trust for the benefit of one or more beneficiaries. The stricter regulations imposed on a property guardian or conservator would not grant this freedom.

income
Interest, dividends, or other return from invested capital.

EXAMPLE: After reviewing the pros and cons of wills, trusts, and guardianships, Joshua and Taylor Price, who have two minor children, decide on the following: Since he has a terminal illness, Joshua drafts and executes his will, which leaves his entire estate to his surviving spouse, Taylor. He is confident that she will provide for their minor children and eventually transfer the balance of the property to them in her own will. Since no property is left to the minor children, guardianships (with their corresponding control and expense) are avoided. In the event that Taylor dies first, Joshua adds a contingent testamentary trust, which leaves his estate to the trust for the benefit of his minor children.

Other reasons for the creation of trusts include the following:

- Trusts are used to provide professional management of the trust property for those beneficiaries (including a settlor-beneficiary) who do not have the time, inclination, or skill to manage the property themselves or, because of illness or incapacity, are no longer able to do so.
- Trusts known as **public (charitable) trusts** can be established for religious, scientific, charitable, literary, or educational purposes under IRC § 170(c)(4).
- Trusts can prevent spendthrift beneficiaries, including children, from recklessly depleting the trust fund and can also prevent their creditors from obtaining the trust principal on demand for the payment of debts.
- Trusts can save taxes and avoid probate expenses if properly established.

public (charitable) trust
A trust established for the social benefit either of the public at large or the community.

A complete discussion of the formation, drafting, and types of trusts, including the popular living trust, is included in Chapters 12 and 13.

Selection of a Personal Representative

The **personal representative** is a Uniform Probate Code term that identifies the man or woman who manages, administers, and distributes a decedent's estate according to the terms of a will or the appropriate state intestate succession statute if the decedent dies without a will; see UPC § 1–201(35). A personal representative includes an **executor** (man) **or executrix** (woman) who is selected by a testator to carry out the terms of a will or an **administrator** (man) or **administratrix** (woman) who is appointed by the court to administer the estate of a decedent who dies intestate. Consideration by the testator should be given in the selection of the personal representative, especially if the estate contains digital data. A personal representative who is competent to handle an estate that includes digital data may require special skills and responsibilities. Throughout the remaining chapters of the text, the words *personal representative* will be used to identify any person who has the responsibility to administer the estate of a decedent who dies either testate or intestate. The various types of personal representatives and the important role they play in administering the decedent's estate are discussed in Chapters 7, 8, and 9.

personal representative
The person who administers and distributes a decedent's estate according to the will or the appropriate intestate succession statute. It includes executor and executrix when there is a will and administrator and administratrix when there is no will.

executor or executrix
A man or woman named in the will by the maker to be the personal representative of the decedent's estate and to carry out the provisions of the will.

administrator or administratrix
The man or woman appointed by the probate court to administer the decedent's estate when there is no will.

Like trustees and guardians, the personal representative is a fiduciary who owes fiduciary duties (acts of trust, loyalty, and good faith) to the recipients of the decedent's estate (e.g., beneficiaries, heirs, and devisees). To acquire the authority and powers of the position, a personal representative must be appointed by the appropriate court, often called the probate court. Generally, in testacy cases, the court appoints the person nominated in the testator's will unless that person is not qualified under state law. Whether a person dies with or without a will, states usually have statutes that list the persons who are not qualified to be personal representatives (see Tex. Prob. Code Ann. § 78). The Texas list includes the following:

1. An incapacitated person (e.g., minors or incompetent persons)
2. A person convicted of a felony
3. A nonresident (natural person or corporation) who has failed to appoint a resident agent to accept service of process
4. A corporation that is not authorized to act as a fiduciary in the state
5. A person whom the court finds "unsuitable"

EXAMPLE: Leslie Powell's will names Aaron Shroeder to be the personal representative. Due to previous associations, Leslie's family and heirs feel extremely hostile toward Aaron. The hostility of beneficiaries toward a nominated personal representative does not ordinarily or automatically

disqualify the person as "unsuitable." However, see *Matter of Petty's Estate*, 227 Kan. 697, 608 P. 2d 987 (1980), where the court refused to appoint the will's nominee to be personal representative, because the hostility between the beneficiaries and nominee could lead to unnecessary difficulties and expenses for the estate.

Caveat: If a testator selects a personal representative and also in the will names an attorney to assist the personal representative with the estate administration, the estate is not legally bound to this selection. Personal representatives have the right to select an attorney of their own choice to represent the estate. ***It is a violation of the Code of Ethics for the attorney or paralegal to suggest that they be named in the will for such purpose***.

⚖ ETHICAL ISSUE

Chapter 3 of this text discusses death with a will (testacy) and death without a will (intestacy) in more detail.

WILL SUBSTITUTES

In rare cases, it may not be necessary to have a will. However, the decision should be made *only* after consultation with an attorney knowledgeable about estate planning. It may be possible, especially with small estates, to employ "will substitutes" instead of a will to distribute a decedent's estate. Examples of will substitutes include (1) joint tenancy, (2) life insurance with an identified beneficiary, (3) *inter vivos* trusts, (4) *inter vivos* gifts, (5) community property agreements, and (6) **transfer-on-death deeds/transfer-on-death affidavits or beneficiary deeds**. The value and kinds of property owned by the client and the needs of the beneficiaries generally determine whether a will should be executed. However, as a safety precaution, it is a good idea to always have a will. Clients may forget about establishing an asset as right of survivorship, the survivor may die simultaneously with the client, the client may fail to identify a beneficiary or the beneficiary may predecease the client who forgets to name a new beneficiary. All of these scenarios would cause the client's asset(s) to pass through intestacy, instead of the way the client intended.

transfer-on-death deed/ transfer-on-death affidavit or beneficiary deed
A type of deed or affidavit properly executed and recorded that allows the transfer of real property to a designated beneficiary without probate. The transfer does not take effect until the death of the owner.

- Joint tenancy

joint tenancy
Ownership of real or personal property by two or more persons with the right of survivorship.

EXAMPLE: Jean and her fiancé, Darnell, own a house in **joint tenancy** valued at $90,000. They also have $1,200 in a checking account and $4,000 in a savings account, which are both joint tenancy accounts. They each own other separate property. Both Jean and Darnell are salaried employees and contributed equal sums to purchase the home and to the checking and savings accounts. Jean dies without a will. As the sole surviving joint tenant, Darnell will receive all the joint tenancy property, which was the couple's intent. Jean's individual or separate property has to go through probate. The tax consequences in such cases will be discussed in the tax chapter (see Chapter 11). A more complex problem could result, however, if the unmarried couple were to die in a common disaster and both die intestate.

- Life insurance

EXAMPLE: As another example of a will substitute, assume that Tierra, a single parent, had only one major asset, a $100,000 life insurance policy through a group plan with premiums paid equally by Tierra and her employer. Her son, Christian, is named as sole beneficiary. If Tierra dies testate or intestate, Christian will receive the proceeds of the life insurance policy, which do not go through the probate process. Under current tax law, the proceeds are not taxable income or a gift to Christian, so no income or gift taxes are owed (see Chapter 14).

- *Inter vivos* (living) trust

EXAMPLE: Serena owns an apartment building valued at $300,000. During her lifetime she places this property in an *inter vivos* (living) trust, naming her brother, Garrett, trustee, and two friends, Vaughn and Renee, beneficiaries. In the trust instrument, Serena directs the trustee to pay the income from the trust property—the apartment building—to the beneficiaries, Vaughn and Renee, during their lifetimes and, at the death of the last of the two to survive, to convey the apartment building and land to the children of Renee (Jayden and Cody) as tenants in common. Even if Serena dies testate or intestate, the distribution of the trust income and the trust property will be determined by the trust instrument. Any remaining property in Serena's estate at her death will be distributed according to the provisions of her will or according to the state intestate succession statute. For a more complete discussion of the use of an *inter vivos* (living) trust as a substitute for a will, see Chapter 13.

- *Inter vivos* gift

EXAMPLE: Anyone may dispose of property while alive by gift. During his lifetime, Sherman gives his relatives and friends $100,000 in cash, $50,000 in stocks and bonds, a pickup truck, and his collection of Chinese figurines. Once these gifts are delivered (executed), Sherman has no legal right to demand their return. Gift taxes may be due and payable on the *inter vivos* gifts if Sherman exceeds the current $15,000 (as of 2020) per donee annual exclusion. The exclusion is indexed annually for inflation and may change. Annual gifts over a lifetime can reduce the size of the donor's estate and result in death tax savings. For a complete discussion of the gift tax laws, see Chapters 11 and 14.

- *Community* property agreement

EXAMPLE: The state of Washington has a document authorized under its community property law called the "community property agreement." The agreement acts as a will substitute and is often used by a married couple domiciled in Washington to transfer, at the death of the first spouse, all the community estate to the surviving spouse without the necessity of probate. These agreements, with varying provisions, are also used in Alaska, Idaho, Texas, and Wisconsin.

- Transfer-on-death deed, transfer-on-death affidavit, or beneficiary deed

EXAMPLE: Missouri authorizes the use of a beneficiary deed to avoid probate. This type of deed conveys an interest in real property to a designated beneficiary that does not take effect until the death of the owner. It is legal only if executed and recorded with the recorder of deeds where the real property is located (see Mo. Rev. Stat. § 461.025). In addition to Missouri, the states of Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Maine, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming have authorized the use of either a transfer-on-death deed, transfer-on-death affidavit or beneficiary deed (see Exhibit 1.3). Two other states, Florida and Michigan, have a document known as an enhanced life estate deed, or "Lady Bird" deed, that functions like a transfer-on-death deed. However, this type of deed is not common. As the trend appears to be toward permitting TOD deeds, or some form, more states may be added in the future.

EXHIBIT 1.3 Transfer-on-Death Deed

TRANSFER-ON-DEATH DEED

_____, (marital status) as owner, transfers on death to

_____ as grantee beneficiary (beneficiaries) the following

described interest in real estate located in _____ County, Kansas:

Except and subject to:

THIS TRANSFER-ON-DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATION BY THIS OWNER FOR THIS INTEREST.

This TOD is made pursuant to K.S.A. 59-3501 *et seq.*

_____
Grantor

_____
Grantor

Dated: _____

STATE OF _____)
) SS.
COUNTY OF _____)

ThisTransfer-on-Death Deed was acknowledged before me on _____ _____, _____, by _____ (marital status)

dated _____ _____, _____.

(SEAL) _____

Printed Name: _____
Notary Public

My Appointment Expires: _____

Pursuant to K.S.A. 79-1437e, a real estate validation questionnaire is not required due to Exception No. _____ (complete if applicable).

Reserved for Register of Deeds

017D-10/97

Basic Requirements for a Legal Will—A Review

The testator must have the following:

- Legal capacity—generally age 18 or older
- Testamentary capacity—be of sound mind (sanity)

The will must

- be written, i.e., typewritten, computer generated and printed (today's method), or handwritten (allowed in some states).
- be signed by the testator usually in the presence of witnesses.
- be dated (in most states).
- be attested and signed by two witnesses.
- select a personal representative (executor or executrix) to administer the decedent's estate.

See a detailed discussion of these requirements in Chapter 4.

THE NEED FOR A WILL—A CONCLUSION

In summary, there are numerous reasons why so many Americans die without a will. They include the following:

1. Some people, by statute, cannot make a valid will (e.g., minors and incompetent persons).
2. Everyone does not need a will. Some people have limited or no property; others have no heirs (and believe they have no need); and some are satisfied with the "will" their state makes for them, i.e., the intestate succession statute.
3. Some attempt to create a will, but it is declared invalid by the probate court due to improper execution.
4. Some people, concerned about the cost of a will or their reluctance to discuss their finances, procrastinate too long and die prematurely. Others simply do not bother.
5. Some use "will substitutes" instead of wills to distribute the decedent's estate.

As Chapter 2 will explain, the need for a will is determined by the kind of property the individual possesses and the form of the possessor's ownership, but one should carefully consider why a will is beneficial to most people.

KEY TERMS

testament
estate plan
disposition
will
statutes
legal capacity
testamentary capacity
testator (male)/testatrix (female)
sound mind
execution of a valid will
holographic will
beneficiary [of a will]
formal probate
informal probate
Uniform Probate Code (UPC)
probate court
domicile
real property
ambulatory
codicil
letter of instructions
surviving spouse
apportionment clause
residuary estate
legatee
pro rata
tenancy in common
tenant in common
intestate succession statutes
guardian
spouse's statutory, forced, or elective share
ward
incompetent person
personal guardian
property guardian
fiduciary
heir
fiduciary duty
adoptive parent
conservator
testamentary trust

inter vivos or living trust
trust
settlor
legal title [of a trust]
trustee
beneficiary [of a trust]
equitable title [of a trust]
bypass trust
principal
federal estate tax
income
public (charitable) trust
personal representative
executor or executrix
administrator or administratrix
transfer-on-death deed or beneficiary deed
joint tenancy

REVIEW QUESTIONS

1. Explain the reasons why many Americans die without wills.
2. What does it mean to say the maker of a will has testamentary capacity? How does it differ from legal capacity?
3. List your state's statutory requirements for the execution of a will. How do your state's requirements for a valid will differ from those of other states?
4. Since the terminology included in this chapter is essential to your understanding of legal concepts and procedures presented in future chapters and your practice in the fields of wills, trusts, and estates, write out your own definition of each key term in this chapter. Are your definitions essentially the same as those in the text?
5. Can a will be changed or revoked? Explain.
6. List and explain the various reasons or purposes for making a will.
7. Identify six examples of "will substitutes" and discuss how each might possibly be used to eliminate the need for a will.

CASE PROBLEMS

Problem 1

Cho Wang handwrote a three-page will in pencil. At the end of the business day, he took the will to an attorney and asked that it be typed. Since Cho mentioned that he was leaving on a vacation and would be out of state for one week, the paralegal for the firm asked if he would like to sign the handwritten (holographic) will. Cho did sign the will, but he also stated that he would return after his trip to sign "his will," i.e., the typed will. While on vacation, Cho suddenly became ill and died. Answer the following:

A. Is a signed holographic will a valid will in your state?

B. Are witnesses required for a holographic will?

C. Should the executed holographic will operate as Cho's will pending the execution of the typewritten will? Explain. See and compare *In re Teubert's Estate*, 171 W.Va. 226, 298 S. E.2d 456 (1982).

Problem 2

Raj Gupta died testate. He was survived by 27 nieces and nephews. Raj had little formal education and had not learned how to write his signature; therefore, he signed his name with a mark, i.e., an "X." Raj's nieces and nephews challenged the validity of his will. They claimed the will had been improperly executed because he signed with an "X."

A. Is a testator's mark, i.e., an "X," sufficient to satisfy the signature requirement for a valid will in your state? Cite the statute or case law.

B. In your opinion, if there is no statute or case law on this issue in your state, how should your state court decide this issue? See and compare *In re Hobelsberger's Estate*, 85 S.D. 282, 181 N.W.2d 455 (1970).

PRACTICAL ASSIGNMENTS

1. Draft a clause that would be included in a letter of instruction that contains instructions regarding the donation of your organs upon death.
2. Locate your state statute regarding intestate succession. Apply the statute to your estate to determine who would inherit from you if you died without a will.
3. Examine the last will and testament of Elvis Presley (see http://www.ibiblio.org/elvis/elvwill.html). Who did Elvis appoint as the executor of his estate? Did Elvis name an alternate executor? If so, who?

CHAPTER 2

The Concept of Property Related to Wills, Trusts, and Estate Administration

CHAPTER OUTLINE

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:

- Identify, explain, and classify the various kinds of property, such as real and personal property or probate and nonprobate property.
- Recognize the terminology associated with property law.
- Distinguish the various forms of ownership of real and personal property.
- Explain the requirements for the creation and function of various forms of ownership.
- Discuss why states are allowed to enact laws that govern the passage of property.
- Explain why courts do not favor the creation of joint tenancies between parties other than spouses.
- Identify the community property states.
- Differentiate between community and separate property.
- Explain the kinds, methods of creation, and characteristics of estates in real property.

SCOPE OF THE CHAPTER

Everyone owns some kind of property (e.g., a home, a car, savings and checking accounts, appliances, clothes, jewelry, websites) or stocks and bonds. While alive, the owner of certain property called probate property (discussed below) has the opportunity to transfer it by gift, sale, or the creation of an *inter vivos* (living) trust. After the owner dies, probate property can pass by will, testamentary trust, or **inheritance,** according to state law. Without property, a will is unnecessary, and a trust cannot be created. Thus, property is the essential component that establishes the need for and purpose of wills and trusts. You must fully understand the law of property and its terminology before you can draft wills or trusts and assist with the administration of a decedent's estate. This chapter introduces the terminology of the law of property; explains its association with wills, trusts, and estate administration; and discusses related statutes and court decisions. Also introduced are ways or forms in which property can be owned; each form of ownership is identified, defined, and explained. Estates in real property (freeholds and leaseholds) are also covered.

inheritance
Property that descends (passes) to an heir when an ancestor dies intestate.

PROPERTY: TERMINOLOGY AND CLASSIFICATION

Property is anything subject to ownership. It is classified as either real property or personal property.

Real Property

Real property (also called realty or real estate) is property that is immovable, fixed, or permanent. It includes the following:

- Land
- Structures affixed to land such as houses, apartment buildings, condominiums, and office buildings
- Objects attached to land and buildings called fixtures
- Things grown on land except those for the purpose of sale (see below)

Owners of real property also have rights to airspace above their land and to the earth below it, including any minerals contained within.

Fixtures

fixture
Something so attached to land as to be deemed a part of it (e.g., real property that may have once been personal property but now is permanently attached to land or buildings).

A **fixture** is real property that may once have been personal property but now is permanently attached to land or buildings. An example of a fixture that grows on land is a tree; however, growing crops that are annually cultivated for sale like corn, wheat, and vegetables are not fixtures. They are considered to be personal property. Carpeting nailed to the floor and a built-in dishwasher are examples of fixtures in buildings.

State courts apply three tests—annexation, adaptation, and intention—to determine if personal property has been converted into a fixture.

1. Annexation means that the personal property has been affixed or annexed to the real property.
2. Adaptation means that the personal property has been adapted to the use or purpose of the real estate. The court asks whether the property is necessary or beneficial to the function or enjoyment of the real estate.
3. In most states, however, the intention of the person who annexed the personal property to the real property has been the controlling test that determines the existence of a fixture.

Courts throughout the country vary substantially on what constitutes a fixture, but generally, though not always, doors, fences, windows, stoves, refrigerators, electric lights, wall-to-wall carpeting, and the like are held to be fixtures. Compare the following cases.

- *Mortgage Bond Co. v. Stephens,* 181 Okl. 419, 74 P.2d 361 (1937), in which the court held that a refrigerator was a fixture, as it was built into the cabinets.
- *Elliott v. Tallmadge,* 207 Or. 428, 297 P.2d 310 (1956), in which the court held that a refrigerator was personal property, as it could be moved at will by simply unplugging it.

Tenants often install fixtures on property they rent. A tenant farmer who raises chickens may build a shed to shelter them or install gasoline tanks to avoid long drives to town for fuel; a tenant who rents an apartment may add carpeting, bookshelves, and a doorbell for comfort and convenience. Previously, any such items a tenant attached to the real estate could not be removed when the tenant vacated. Today, however, tenants may remove property they have attached to

real estate if the property falls under one of three exceptions, known as tenant's fixtures.

1. *Trade fixtures*. Property placed on the land or in a building to help the tenant carry on a trade or business.

   EXAMPLES: Smokehouse, machinery, barber chairs, greenhouse, pipe organ.

2. *Agricultural fixtures*. Property annexed by the tenant for farming purposes.

   EXAMPLES: Wooden silo, toolshed, henhouse, hay carrier, irrigation plant.

3. *Domestic fixtures*. Property attached by the tenant to make an apartment more comfortable or convenient.

   EXAMPLES: Carpeting, dishwasher, clothes dryer, gas stove, bookshelves.

ASSIGNMENT 2.1

Henry recently sold his movie theater to Helma. Which of the following items are fixtures (real property) that now belong to Helma? Give reasons for your answers.

Seats in the auditorium	Popcorn machine	Furnace in the building
Computers in the office	Movie projector	Framed movie poster
Carpeting in the theater	Movie film	Mirrors in the restrooms

Transfers of Real Property

When real property is transferred by gift or sale, the title or ownership is conveyed to the donee or buyer by a formal written document called the **deed**. Some of the more important terms associated with transfers of real property include the following:

deed
A writing signed by the grantor whereby title to real property is transferred or conveyed to the grantee.

- *Transfer*. An act by which the title to property is conveyed from one party to another. A party may be a person, a corporation, or the government.
- *Conveyance*. Any transfer by deed or will of legal or equitable title (see below) to real property from one person to another.
- *Disposition*. The parting with, transfer, or conveyance of property.
- *Grant*. A transfer of title to real or personal property by deed or other instrument.
- *Grantor*. The person who conveys (transfers) real or personal property to another. In the law of trusts, the creator of a trust is also called the settlor or trustor.
- *Grantee*. The person to whom real or personal property is conveyed.

EXAMPLE: Cody conveys Blackacre, a farm, by deed to his friend Noah. Cody is the grantor; Noah is the grantee. The act of conveyance of Blackacre to Noah is a disposition.

- *Deed*. A written, signed, and delivered legal document that transfers title or ownership of real property such as land or buildings from a grantor to a grantee.

- *Title*. In the law of property, the right to and evidence of ownership of real or personal property.
- *Legal title*. A title that is complete, perfect, and enforceable in a court of law, granting the holder the right of ownership and possession of property. In the law of trusts, the trustee receives legal title that provides the right of ownership and possession but no beneficial interest in the property that exists in another (i.e., the holder of the equitable title who is the beneficiary of the trust).
- *Equitable title*. In the law of trusts, a party who has equitable title has the right to have the legal title transferred to him or her. The person, i.e., beneficiary, who holds the equitable title has the beneficial interest, which includes the right to the benefits of the trust, and is regarded as the real owner although the legal title is placed in possession and control of the trustee.

POINT OF INTEREST

Use Technology to Access Real Estate Records

Land record offices and for-profit companies are making real property records, including deeds, mortgages, and tax information, accessible through the Web. Information about a parcel of property may be accessed by owner's name, street address, or tax identification number.

- *Interest*. The terms *interest* and *title* are not synonymous. An interest entitles a person to some right in the property, but that right may be less than title or ownership.
- *Vest*. To deliver possession of land. At death, state law automatically vests title to the decedent's real property in beneficiaries of the will or in heirs if the decedent dies without a will "subject to" the right of the personal representative to devest or take away the property in order to pay claims of the decedent's creditors (see Cal. Prob. Code § 7000 and Tex. Prob. Code Ann. § 37).
- *Devest or divest*. To withdraw or take away title from the possessor.

The following example illustrates the use of these and earlier terms.

EXAMPLE: Keisha agrees to buy Malik's cottage. At the closing, Malik *transfers title* to the cottage by the *conveyance* of a *deed* to Keisha. Since Malik is the person (seller) who transfers *real property* (the cottage) to another (Keisha, the buyer), Malik is also the *grantor*. Keisha is the *grantee*. Clearly, Keisha has an *interest* in the cottage, and in this case, her interest is the *ownership* (*title*) of the cottage. One year later, Keisha dies in a car accident without having made a will.

Title to real property (cottage) owned by the decedent (Keisha) *vests* in her heirs the moment she dies. If Keisha had substantial debts, her personal representative may have a right to *devest* (*take away*) the property from the heirs and sell it to pay creditors' claims. However, title to Keisha's *personal property* passes to her *personal representative*, who uses the property, if necessary, to pay taxes due and creditors' claims or transfers it to *beneficiaries* of the will or to *heirs* if there is no will.

In another scenario, Keisha creates an *inter vivos* (living) trust and names her friend Gabe as *trustee*. The trust property is an apartment building,

which is conveyed by deed into the trust and splits title to the apartment so that Gabe, the trustee, holds legal title and Keisha's daughter, Naomi, the *beneficiary*, holds the *equitable title*. As trustee, Gabe has *fiduciary duties* to manage and maintain the apartment for Naomi's benefit until the trust terminates when he transfers the apartment building to Naomi according to the terms of the trust.

Personal Property

Personal property is movable property. It is everything subject to ownership that is not real estate and includes such items as clothing, household furnishings, stocks, money, contract rights, digital assets, and life insurance. A **chattel** is an item of personal property.

chattel
Generally, any item of personal property.

At death, title to a decedent's real property vests directly in the decedent's beneficiaries or heirs. Title to the decedent's personal property passes to the personal representative (executor or administrator) appointed to handle the administration of the decedent's estate. If creditors must be paid, the decedent's personal property is generally used first to obtain the necessary funds and real property is the last asset used to pay estate debts.

Personal property can be subdivided into two categories.

1. *Tangible personal property*. Property that has a physical existence (i.e., it can be touched and is movable).

EXAMPLES:

Merchandise	Animals	Tools
Clothing	Household goods	Furniture
Appliances	Jewelry	Works of art
Books	China	Stamp/coin collections
Television sets	Cars	Boats
Airplane	RVs	Computers

2. *Intangible personal property*. Property that has no physical existence, i.e., it cannot be touched. Although such property has little or no value in itself, it establishes and represents the right to receive something of value. The ownership of intangible property is established by various documents, such as bank statements, stock or bond certificates, and written contracts for life insurance and annuities.

Intangible personal property also includes a **chose in action**, a right to bring a civil lawsuit to recover possession of personal property or receive money damages (e.g., payment of a debt). An important, yet often overlooked, area that qualifies as intangible personal property includes digital assets. Digital assets are those that are stored electronically, either locally or in the cloud. In addition to images, photos, music, and videos, digital assets include reward points, electronic mail, electronic money, social media accounts, online accounts, websites, video gaming accounts, intellectual property, and domain names.

chose in action
A right to bring a civil lawsuit to recover money damages or possession of personal property.

EXAMPLES: A 10-dollar bill is just a piece of paper; however, it represents the right to receive property worth 10 dollars. A promissory note by itself has no value, but it represents the right to receive payment from a debtor. The 10-dollar bill and the promissory note are intangible

personal property. Examples of intangible personal property include the following:

Cash	Savings and checking accounts
Profit-sharing plans	Shares of corporate stock
Annuities	Corporate and government bonds
Pension plans; life insurance proceeds; patent rights	Negotiable instruments (checks and promissory notes); government benefits, such as Social Security and veterans' benefits
Copyrights	Individual retirement accounts
Trademarks; royalties	Claims against another person for debts, property damage, personal injury, or wrongful death
Bitcoins	Frequent flier miles
Podcasts	Online poker account
Blogs	Electronic mail

ASSIGNMENT 2.2

Classify each of the following items by placing a mark (X) in the most appropriate column.

Item	Real Property	Tangible Personal Property	Intangible Personal Property
Car			
Cash in checking account			
Right to renew apartment lease			
Hotel loyalty points			
House			
Life insurance proceeds			
Furniture			
eBay account (for the sale of your property)			
Stocks and bonds			
Furnace			
Personal injury lawsuit			
Clothing			
Dishwasher (built-in)			
Dishwasher (portable)			
Mobile home on wheels			
Houseboat			
Tax refund check			
Television roof antenna			
Bookcase			
Trees on land			
Gun collection			
Corn growing on farm			
Online blog			

Your major role, as part of the legal team, will be to help the personal representative find, collect, preserve, appraise, and liquidate or distribute the decedent's personal assets. These tasks will be discussed in more detail in future chapters. In addition, you will have to list all the decedent's assets and classify them as real property or tangible or intangible personal property. Since an accurate classification is essential to the administration of the estate, you must learn to distinguish the different types of property and ***be sure to verify your classification with your supervising attorney.***

ETHICAL ISSUE

Probate Property or Probate Estate

Most decedents own one or both of the two types of property (real and personal). Together, these assets are often called the decedent's estate. An **estate** (also called a gross estate) is all the property, real and personal, owned by any living person, or all the assets owned by a decedent at the time of death.

estate
All property owned by a person while alive or at the time of death. Also called gross estate, probate estate, probate assets, or probate property.

> **EXAMPLE:** Oxana Drosdov is single. She owns her home, furniture, household goods, and clothes. She has money in savings and checking accounts, stocks and bonds, and valuable jewelry. She maintains a blog and has electronic email, along with a social media account. She also owns a lake cottage with a boat and motor. All these property items, real and personal, constitute Oxana's estate or gross estate.

Not all property owned by the decedent can be passed by will, however. The only type of property a decedent can distribute through a will or by intestate succession, if there is no will, is **probate property**, which is also referred to as probate assets, the probate estate, or simply the estate.

probate property
Decedent's property that is subject to estate administration by the personal representative.

Probate property is all real or personal property that the decedent owned either individually as a single or sole owner, called ownership in **severalty (tenancy in severalty)**, or as a co-owner with another person or persons in the form of ownership called tenancy in common. Probate property is subject to estate administration by the personal representative (executor or administrator) according to the terms of the will or, if the decedent died intestate, without a will, according to the appropriate state intestate succession statute.

severalty (tenancy in severalty)
Ownership of property held by one person only.

> **EXAMPLE:** Kiara Morgan owns her house, car, furniture, social media accounts, email account, and savings account in severalty; i.e., she is the sole owner of each of these items of property. Kiara also owns a boat and condominium equally with her best friend, Breana, as tenants in common. If Kiara dies and her debts and taxes due are paid, all of this property, including her one-half interest in the boat and condominium as a tenant in common, will be probate property and will pass to her named beneficiaries or devisees if she has a will or to her heirs if she dies intestate.

Probate property includes the following:

- Real property owned in severalty (single ownership) or in a tenancy in common
- Personal property owned in severalty or in a tenancy in common
- Life insurance proceeds payable to the estate
- Monies owed the decedent for mortgages, promissory notes, contracts for deed, loans, rents, stock dividends, income tax refunds, interest, royalties, and copyrights
- Gain from the sale of a business (traditional or online)
- Social Security, railroad retirement, and Veterans Administration benefits

- Civil lawsuit for money damages
- Testamentary trusts

Probate property is subject to creditors' claims and federal and state death taxes (see below).

Nonprobate Property or Nonprobate Assets

Some of the real and personal property owned by the decedent at the time of death cannot be transferred by will or inheritance; therefore, it is not subject to probate. This is the decedent's nonprobate property and includes the following:

- Real and personal property owned and held in joint tenancy, tenancy by the entirety, or, in certain states, community property with the right of survivorship
- Real and personal property transferred into an *inter vivos* (living) trust prior to the settlor's death
- Real property subject to transfer under a transfer-on-death deed or beneficiary deed
- Money placed in a bank account as a **Totten trust**, or as a pay-on-death (POD) account
- Securities, including brokerage accounts, registered in transfer-on-death (TOD) form
- Proceeds of a life insurance policy payable to a named beneficiary (recipient of the money) and not to the decedent's estate as long as the decedent retained the **incidents of ownership** (see discussion in Chapter 14)
- Employment contract benefits that contain a named beneficiary (not the estate) such as profit-sharing plans, pension plans, group life insurance, 401(k) plans, employee stock ownership plans (ESOPs), and self-employed retirement plans
- Annuity contracts with a named beneficiary (not the estate)
- Individual retirement accounts (traditional and Roth IRAs) with a named beneficiary (not the estate)
- U.S. savings bonds payable on death to a named beneficiary (not the estate)
- Property owned in *tenancy in partnership* (see glossary)

Totten trust
A bank deposit of a person's money in the name of the account holder as trustee for another person.

incidents of ownership
An element or right of ownership or degree of control over a life insurance policy.

Each of these types of nonprobate property goes directly to the named beneficiary or to the surviving joint tenant(s) or partners by **operation of law**. If the decedent's entire estate consists of nonprobate property, there is no need for estate administration (probate).

operation of law
Rights pass automatically to a person by the application of the established rules of law, without the act, knowledge, or cooperation of the person.

Nonprobate property is real or personal property that is not part of the decedent's probate estate. Therefore, this property is

- not distributed according to the decedent's will.
- not distributed according to intestate succession statutes if there is no will.
- not subject to estate administration (probate) of the decedent's estate.
- not subject to a surviving spouse's claims.
- not subject to claims of the decedent's creditors.

However, nonprobate property is part of the decedent's *gross estate* for federal and state death tax purposes; i.e., it is subject to federal and state estate taxes and state inheritance tax, and, therefore, you must identify and keep accurate records of each property item for the preparation of required tax returns. See Exhibit 9.10 and Chapter 11.

Digital Assets and Their Effect on Estate Planning

Historically, information was stored using a variety of physical resources (e.g., photo albums, letters, or journals). There has been a major shift in how we preserve our data with much now being stored electronically. This data can include sentimental items such as emails, photos, and music as well as items of economic value, such as client lists, outstanding accounts, reward points, cryptocurrency, and online gaming items. Quite simply, the *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)* defines a digital asset as anything that is stored electronically in which individuals have a right or interest—a definition that is always evolving. Combined, these digital assets make up one's digital estate. As the number and value of digital assets held by the average person increases, how these assets are disposed at an individual's death or incapacity has becoming increasingly more problematic. With the proliferation of digital technology, a major portion of an estate may include digital assets. Prior to the enactment of the RUFADAA and its predecessor, the UFADAA, a personal representative was denied access to these electronic assets, preventing them from collecting and managing a decedent's assets. Most are password protected, and accessing them may have violated federal felony laws under the Electronic Communications Privacy Act. Items stored on third-party servers, such as online banking, Facebook, and Google, have restrictive terms-of-service agreements. The UFADAA attempted to solved some of these issues by providing fiduciaries with access to these accounts. However, technology companies and privacy advocacy groups, like the ACLU, argued that the act infringed on the privacy of the users and exposed the companies to potential liability. The RUFADAA attempts to rectify the problems in the UFADAA by balancing these issues. The drafters at the Uniform Law Commission (ULC) stated that the act "gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property." A user can now give access to their assets after death by adding a clause in their will or trust or through a power of attorney during their lifetime. Additionally, the RUFADAA allows users to create an online tool, known as Legacy Contact on Facebook, that identifies the extent to which they wish to reveal their digital assets to third parties, including fiduciaries or personal representatives. There is one important thing to note about the RUFADAA: If an individual chooses to use a custodian's online tool, all other instructions become irrelevant. In effect, this means that if the user names his son in the online tool and his wife as the executor in his will, the online tool prevails over the provider's default terms of service and the client's own will, trust, power of attorney, or other legal document that might name a person to oversee their digital assets. Therefore, the wife would not be permitted access to those digital assets. If no online tool exists, the users' legal documents, such as a will, trust, or power of attorney can be used to explicitly grant a fiduciary access to any/all digital access or to restrict such access. If there is no guidance in a will, trust, or power of attorney, and there are no instructions to the contrary, a custodian's default terms of service will dictate a fiduciary's access to a user's digital assets. The RUFADAA has been approved in some variation in most states.

Assuming the personal representative has the right to access the account, the next hurdle is to find the digital assets. Testators should be encouraged to maintain an inventory of accounts with access information. It should include the physical location of each account, username and password access, and their selected beneficiary for each asset. However, caution should be used to protect the information contained in the inventory. If the information is included in the will, it becomes public with the publication of the will. If the testator uses a password-manager program, the access information to that account can be shared with the

personal representative. While it remains impossible to ameliorate the potential legal problems associated with accessing the account in most states, some form of written permission would be advisable.

POINT OF INTEREST

In light of the problems that have arisen with accessing and transferring digital data, companies have sprung up that offer to manage and transfer your "virtual legacy." They allow you to store your digital assets in an online version of a safety deposit box. Upon proof of death and verification of your beneficiaries, they will manage the process of passing your digital assets in accordance with your wishes. However, problems have also arisen with this process. The first is that the software only works if the testator has entered all of the requisite date prior to death. Secondly, the assets pass via will, revocable trust, or other type of transfer. These online companies may transfer the asset to the wrong beneficiary, potentially resulting in a lawsuit. And lastly, the selected online company may no longer be in business at the time of death.

STATUTES THAT GOVERN THE PASSAGE OF PROPERTY

The law of property is mostly statutory law. States have the power to enact statutes that govern the passage of property from one generation to another or from the deceased to someone in their own generation. The states derive such power from their right, under the U.S. Constitution, to levy and collect taxes and from their duty to protect the citizenry.

> **EXAMPLE:** If Mariana Garcia dies with a will and owns property that includes her house and items of personal property, such as household furniture, savings and checking accounts, and automobiles, what are the respective rights of her beneficiaries, heirs, and creditors? As an owner of an estate, Mariana Garcia may distribute her property as she wishes, as long as her plans do not conflict with the statutory rights of others (e.g., a spouse, children, or creditors). Generally, a spouse cannot be disinherited, and although children can be disinherited, minor children are entitled to support. Also, all creditors have the right to be compensated for their valid claims; states establish statutory procedures whereby creditors may make claims against the decedent's estate whether or not the decedent has made a will.

Each state requires careful recording of all activity during the administration of a decedent's estate so it can fairly and accurately calculate the amount of tax that may be due from the estate of the decedent. Thus, the state becomes another "creditor" (see Chapter 11).

The state protects the decedent's rights by enacting statutes to ensure that each person will be allowed to make a will. If someone dies without a will, the state's statutes also provide for distribution of the property to those whom the decedent would probably have chosen if the decedent had made a will. These are the laws of **descent and distribution**, more commonly called *intestate succession statutes*. Exhibit 2.1 is the intestate succession statute of New York (for further discussion, see Chapter 3).

descent and distribution
Refers to the distribution by intestate succession statutes.

EXHIBIT 2.1 New York State's Intestate Succession Statute

N.Y. Estates Powers and Trusts Law § 4-1.1
Descent and Distribution of a Decedent's Estate

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a *distributee* from contributing to all such taxes the amounts apportioned against him or her under 2–1.8. Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and *issue*, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) A spouse and no issue, the whole to the spouse.

(3) Issue and no spouse, the whole to the issue, by representation.

(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.

(5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.

(6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

(7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, *per capita*, and the other one-half to the great-grandchildren of the maternal grandparents, *per capita*, provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.

(b) For all purposes of this section, decedent's relatives of the *half blood* shall be treated as if they were relatives of the whole blood.

(c) *Distributees* of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.

(d) The right of an adopted child to take a *distributive share* and the *right of succession* to the estate of an adopted child continue as provided in the domestic relations law.

(e) A distributive share passing to a surviving spouse under this section is in lieu of any right of *dower* to which such spouse may be entitled.

Source: State of New York

ASSIGNMENT 2.3

1. Define the following new words contained in the New York statute (Exhibit 2.1) by using the Glossary at the end of this book (all these terms will be defined and discussed in later chapters): *dower, right of succession, distributee, issue, distributive share, per capita*, and *half blood*.
2. List seven types of property interests that are not part of the decedent's probate estate.

FORMS OF PROPERTY OWNERSHIP

Various forms of property ownership exist. They range from one person who owns or holds the entire interest in an item of real or personal property to situations where two or more persons share concurrent ownership rights as co-owners, also called co-tenants. The most common forms of property ownership are *tenancy in severalty* (individual ownership) and *concurrent ownership* (joint tenancy, tenancy in common, tenancy by the entirety, and community property). The term *tenant* or *tenancy*, which is used to describe severalty and some of the types of concurrent ownership, is synonymous with "owner" or "ownership." Exhibit 2.2 summarizes the forms of property ownership.

Tenancy in Severalty—Ownership by One Person

Tenancy in severalty (ownership in severalty, or individual ownership) means that one person is the sole owner of real property, such as land, or personal property, such as a car. As an individual, the owner in severalty has absolute ownership of the real or personal property with exclusive rights, privileges, and interests. The owner may voluntarily dispose of the property while living, either by gift or sale, may identify a beneficiary to receive the property upon his death, or may dispose of it at death through a will. If no such **disposition** has taken place at the time of death, the property remains in the owner's estate and passes to certain specified takers under intestate succession statutes.

disposition
The parting with, transfer of, or conveyance of property.

EXAMPLE: Juan buys Joe's car. The title is transferred to Juan. Juan is the sole owner of the car. He owns it in severalty.

EXAMPLE: Kennedy is given a ring by her aunt. Once delivered, the ring belongs to Kennedy, solely. She owns it in severalty.

EXAMPLE: Uncle Hiroki died. In his will, he left his lake cottage to his niece, Yumako. Yumako owns the real property in severalty.

EXAMPLE: Reuben owns a life insurance policy, naming Isaiah as beneficiary. Upon Reuben's death, Isaiah is the sole owner of the insurance proceeds. Isaiah owns it in severalty.

EXAMPLE:

Blackacre—a farm

Joel	Tenancy (ownership) in severalty	No person, other than Joel, has any ownership right or interest in the property. He owns the property in a tenancy in severalty (or simply referred to as *in severalty*).

EXHIBIT 2.2 Forms of Property Ownership

Real or personal property can be owned:

By one person (individual ownership)	or	By two or more persons (concurrent ownership)
• Tenancy in severalty		• Joint tenancy • Tenancy in common • Tenancy by the entirety • Community property

Forms of Concurrent Ownership—Ownership by Two or More Persons

Concurrent ownership is a right of ownership in real or personal property shared by two or more persons. The most common forms of such multiple ownership are joint tenancy, tenancy in common, tenancy by the entirety, and community property.

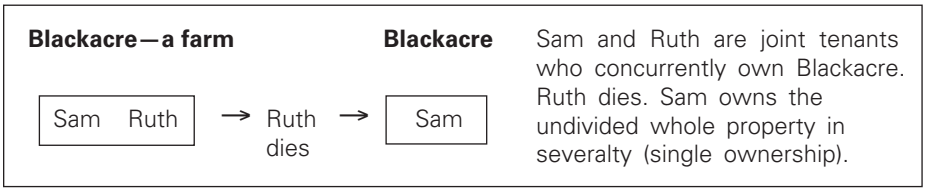
Joint Tenancy

Joint tenancy is the ownership of real or personal property by two or more persons (called the **joint tenants**) who obtain an equal and undivided interest in the property by gift, purchase, will, or inheritance. The unique and distinguishing characteristic of a joint tenancy is the **right of survivorship**. On the death of one joint tenant, the right of survivorship passes the decedent's interest in the property automatically to the surviving joint tenants by operation of law, *without the need for probate* and with the last surviving joint tenant entitled to the whole property in severalty.

joint tenants
Two or more persons who own or hold equal, undivided interests in property with the right of survivorship.

right of survivorship
Passes the decedent joint tenant's interest in property automatically to the surviving joint tenant(s) by operation of law without the need for probate.

EXAMPLE:



The farm goes directly to Sam *without* passing through Ruth's estate. The farm is nonprobate property. Even if Ruth has a will, it does not affect property owned as joint tenants since she cannot pass joint tenancy property through a will.

In order for a joint tenancy to be created, common law requires "four unities": unity of time, unity of title, unity of interest, and unity of possession. According to common law, a simple conveyance of property that uses the words "to two or more persons as joint tenants" does not necessarily create a joint tenancy unless the four unities also exist. The decision in *Cleaver v. Long*, 69 Ohio Law Abs. 488, 126 N.E.2d 479 (1955), supports the common law rules for the creation of a joint tenancy; in the case, the court said all joint tenants must

- have the same interest in land with respect to duration of the estate (unity of interest).
- acquire their interest by the same title (unity of title).
- receive their interest at the same time (unity of time).
- take their right to possession of the estate at the same time (unity of possession).

Cleaver involved a quitclaim deed, a deed without any warranties of the owner's rights, to which husband and wife were both grantors and grantees; the deed created a joint tenancy for them with the right of survivorship. The court ruled that the deed was valid as long as the four unities under common law were present. The next paragraphs discuss the common law definitions of these "unities" in more detail.

Unity of Time

For unity of time to exist, joint tenant owners must receive or take their interests in the property together (i.e., at the same time).

EXAMPLE: In most states, a single conveyance of property from Mia to Lucy and Audrey as joint tenants dated July 15, 2020, creates a joint tenancy. If, however, Mia conveys the property to Lucy and Audrey as joint tenants in a single transfer that takes effect on different dates, Lucy receives an interest on July 15, 2020, and Audrey receives an interest a day later, the conveyance fails in its attempt to create the interest desired, and a tenancy in common exists between Lucy and Audrey. Some states require an express statement to create a joint tenancy and avoid a tenancy in common (see the discussion below).

ASSIGNMENT 2.4

Howard conveys a farm, Blackacre, by deed to "Brown and Jones as joint tenants and not as tenants in common." What form of ownership is presumed in your state by this conveyance?

Unity of Title

For unity of title to exist, the tenancy must be created and the tenants must receive their title (ownership rights) from a single source (e.g., the same will or deed).

EXAMPLE: When Mia, in a single deed, transfers real property to Lucy and Audrey as joint tenants, unity of title exists and a joint tenancy is created. However, if Mia transfers property to Lucy and Audrey by will *and* deed, respectively, or by more than one deed, the use of multiple instruments of transfer fails to meet the unity of title requirement, and a joint tenancy is not created.

Some states do not allow the creation of a joint tenancy wherein the grantor names himself or herself and another or others as joint tenants. For example, if Brown conveys a farm, Blackacre, which he inherited and now solely owns, to "Conrad and himself (Brown) as joint tenants with the right of survivorship," a joint tenancy, generally, does not result because of the lack of unities of time and title. The parties do not receive their interest in the property simultaneously since Brown already owned the farm, nor do they receive their title from one document since Brown received his title through inheritance.

To create a joint tenancy between an existing owner of the property (Brown) and one or more persons, Brown must first transfer a deed to the property to a third person, called the **straw man** (Jones); then, by a second deed, Jones, the straw man, immediately reconveys the property back to the original owner (Brown) and the new co-owner (Conrad) as joint tenants with the right of survivorship. The prevailing view in the majority of states today, however, is that, as in the *Cleaver* case, Brown can convey the farm from himself to "himself and Conrad" and create a valid joint tenancy.

straw man
A person used to create a joint tenancy of real property between the existing owner of the property and one or more other persons.

ASSIGNMENT 2.5

Determine whether your state statute would allow an existing owner to create a joint tenancy as Brown did in the last example by conveying the farm to "himself and Conrad as joint tenants."

Unity of Interest

For unity of interest to exist, each tenant must have an interest in the property identical with that of the other tenants; the interests must be of the same quantity and duration.

EXAMPLE: If Mia conveys property to Lucy, Audrey, and Carol as joint tenants with the right of survivorship, a joint tenancy is created. If instead, Mia gives both Lucy and Carol one-sixth shares of the ownership rights and Audrey a two-thirds share, the unity of interest requirement is not met, and Lucy, Audrey, and Carol own the property as tenants in common, even though the conveyance specifies they are joint tenants.

Unity of Possession

For unity of possession to exist, each joint tenant must own and hold the same undivided possession of the whole property held in joint tenancy. As part of the group that owns all the property, each joint tenant has an equal right to possess the entire property and share equally in the profits and losses derived from the property (e.g., the sale of crops or livestock).

EXAMPLE:

Blackacre—a farm

Roy Alice
Vera

Alice, Roy, and Vera are joint tenants, and each has the right to possess the whole property concurrently with the other co-tenants. None has the right to exclude the others from possession of all or any part of the property, and each has the right to share in profits derived from the use of the farm.

EXAMPLE: A conveyance of a farm, Blackacre, from Mia to "Lucy and Audrey as joint tenants with the right of survivorship" with no restrictions on the amount of their respective possession rights creates a joint tenancy. However, if Mia attempts to limit the possession rights of either Lucy or Audrey and states "to Lucy and Audrey as joint tenants, but only Audrey has the right to possess Blackacre," the transfer fails to create a joint tenancy for lack of the unity of possession.

SUMMARY EXAMPLE: Neil conveys a farm to Rohan, Jay, and Vishnu as joint tenants on June 1, 2020 (unity of time), by a single deed (unity of title). Each co-owner receives a one-third undivided interest (unity of interest) of the whole property, and each has an equal right to possession of the whole (unity of possession). All four unities are present. Therefore, a valid joint tenancy is created if Neil complies with other state statutory requirements (e.g., uses language that indicates he desires to create a joint tenancy) such as "to Rohan, Jay, and Vishnu as joint tenants and not as tenants in common." If any of the four "unities" is not included in the conveyance of the property, the form of ownership created is *not* a joint tenancy but may be a tenancy in common (see the discussion below).

The legal document in Exhibit 2.3, a deed, is executed to illustrate the creation of a joint tenancy with the required four unities. The type of ownership a

ASSIGNMENT 2.6

1. If Efrain Gonzalez owned a farm in your state and died leaving by will the farm to "my three sons, Elias, Manuel, and Javier as joint owners with equal shares," what form of ownership would the three sons have in your state?
2. If Efrain Gonzalez in the problem above had devised the farm "to my three sons, Elias, Manuel, and Javier as joint tenants and not tenants in common," would a joint tenancy be created according to the laws of your state?
3. Joyce, age 21, and Ellen, age 20, are sisters. When Aunt Sandra dies, she leaves her country home "to Joyce immediately and to Ellen on her 21st birthday, as joint tenants with the right of survivorship." What form of ownership has Aunt Sandra created?

person has in real property is determined by an examination of the deed to the property. Notice that the conveyance reads "to Roger L. Green, and Elizabeth R. Green, husband and wife, grantees as joint tenants" and not as tenants in common. In some states, this language is necessary to create the joint tenancy. Since Roger and Elizabeth receive their co-ownership at the same time (August 1, 2020—the date on the deed); by the same legal document (the deed); with the same undivided interest in the whole (equal interest); and with the right to possess the entire property (equal possession), all four unity requirements are satisfied.

EXHIBIT 2.3 Sample Deed Showing Creation of a Joint Tenancy

No delinquent taxes and transfer entered: Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No. _____
_____, 20_____

_____
County Auditor

By _____
Deputy

STATE DEED TAX DUE HEREON: $ 282.70

Date: August 21, 2020

))))))))))

---------- reserved for recording data ----------

GENERAL WARRANTY DEED

FOR AND IN CONSIDERATION OF ONE DOLLAR ($1.00) AND OTHER VALUABLE CONSIDERATION, Henry J. Smith and Sarah M. Smith, husband and wife, hereinafter referred to as "Grantors" of Hamilton County, Ohio grants and conveys with general warranty covenants, to Roger L. Green and Elizabeth R. Green, husband and wife, hereinafter referred to as "Grantees," as joint tenants with right of survivorship whose tax-mailing address is 1463 Main Street, Cincinnati, Ohio 45202, the following real property:

SITUATED IN THE CITY OF CINCINNATI, HAMILTON COUNTY, OHIO:
BEING LOT NO. 11 AND THE EAST EIGHT (8) FEET OF LOT NO. 10, OF JOSEPH HECKINGER'S ADDITION TO THE TOWN OF CINCINNATUS, NOW KNOWN AS CINCINNATI, AS SHOWN ON PLAT RECORDED IN PLAT BOOK 1, PAGE 234.
THE TRACT HEREIN CONVEYED, MEASURED FORTY (40) FEET IN WIDTH FROM EAST TO WEST AND FRONTS ON THE NORTH SIDE OF SECOND STREET (NOW MAIN STREET) BY ONE HUNDRED FORTY (140) FEET IN DEPTH, TO A TWENTY (20) FOOT ALLEY.

(continued)

Exhibit 2.3 *(continued)*

Permanent Parcel No.: 593-0004-0163-00

Property Address: 1463 Main Street, Cincinnati, Ohio 45202

SUBJECT to all existing taxes, assessment, liens, easements, rights-of-ways, covenants and mineral, oil or gas reservations of record, if any, the Grantors hereby covenant that they are seized in fee simple of the above-identified premises and have the right to sell and convey the same; and that Grantors, their heirs and assigns shall warrant and defend the title unto the Grantees, their heirs and assigns against any lawful claims.

TO HAVE AND TO HOLD same unto Grantees as joint tenants with right of survivorship, their heirs and assigns forever, with all appurtenances thereunto belonging.

Prior Instrument Reference: Volume 10, Page 27.

Executed this 11th day of August, 2020.

/s/ Henry J. Smith
HENRY J. SMITH, Grantor

/s/ Sarah M. Smith
SARAH M. SMITH, Grantor

COUNTY OF HAMILTON
STATE OF OHIO

This instrument was hereby acknowledged before me on the 11th day of August, 2020 by Henry J. Smith and Sarah M. Smith to be true and accurate.

My Commission Expires:

_____

_____
NOTARY PUBLIC

This Instrument Prepared by:

Rachel Hensley, Attorney at Law
944 Ravine Street
Cincinnati, OH 45202

ASSIGNMENT 2.7

Assume you own the house in which you now live. Using your state form, draft an unsigned deed conveying the house to your two best friends as joint tenants. Draft a second unsigned deed conveying the house to your friends as tenants in common.

Besides the four unities, certain other characteristics distinguish joint tenancy from tenancy in common and other forms of co-ownership. They include the following:

- Right of survivorship
- **Undivided interest**
- **Severance**

Undivided interest
A right to an undivided portion of property that is owned by one of two or more joint tenants or tenants in common before the property is divided (partitioned).

Severance
The destruction of a joint tenancy by one of the joint tenants transferring while alive his interest in real property to another person by deed, thereby creating a tenancy in common with the new owner and the other remaining joint tenant(s).

Right of Survivorship

When a joint tenant dies, the surviving joint tenants receive the interest of the deceased, i.e., the equal and undivided part, with nothing passing to the beneficiaries, heirs, or devisees of the decedent. The deceased joint tenant's ownership rights pass automatically to the other living joint tenants under the *right of survivorship*. Each joint tenant has this right of survivorship, which prevents a joint tenant from transferring property by a will. If all the joint tenants die except one, the surviving joint tenant owns the property *in severalty*, which means that the joint tenancy is destroyed and the lone survivor owns the property solely.

Undivided Interest

Joint tenants are entitled to the equal use, enjoyment, control, and possession of the property since they have an equal and undivided identical interest in the same property. Each joint tenant is considered to be the owner of the whole property and also of an undivided part. The undivided interest means that no joint tenant owns a specific or individual part of the property. If a joint tenant did own a particular portion of the property, it would be owned as a single owner, *in severalty*, not as a co-owner, *joint tenant*. (See the example and further discussion under Tenancy in Common.)

ASSIGNMENT 2.8

1. Which of the following items of property can be owned in a joint tenancy?

Stocks	House
Bonds	Cottage
Bitcoins	Boat
Art	Condominium
Jewelry	Online gambling account
Car	Contents of a safe deposit box

2. Conchita and Emilio are not related by blood or marriage. All of the items in Question 1 are given, sold, or willed to Conchita and Emilio as joint tenants with the right of survivorship. Emilio dies and owes many debts. Do his creditors have any claim against the property? Can Emilio transfer by will any of the property to his spouse and family? When Emilio dies, who owns the property? What form of ownership is created by Emilio's death?

Severance

While alive, each joint tenant has the right of severance, i.e., an act of severing, separating, or partitioning real property. Severance occurs when a joint tenant owner conveys their equal interest in the property during their lifetime, thereby

destroying one of the four essential unities and terminating the joint tenancy. Such an "*inter vivos*" conveyance, i.e., a transfer of interest by gift or sale while the joint owner is alive, is the *only* way a joint tenancy can be severed. Severance of real property is accomplished when a deed is conveyed. After a joint tenancy is severed in this manner, the remaining joint tenants and the new tenant are tenants in common, and the new tenant has no right of survivorship. (See the examples below.)

EXAMPLE: To illustrate joint tenancy ownership, suppose X dies and gives by will a farm to A and B as joint tenants. If during their lifetimes neither A nor B conveys (gives or sells) his interest in the farm by deed to another person and A dies, B becomes the sole owner (*in severalty*) of the farm through right of survivorship.

X	gives by will →	A and B	A dies →	B owns the property in severalty
decedent	property	joint tenants		

Assume that X dies and gives by will the farm to A, B, and C as joint tenants. C later conveys, by deed, his undivided one-third interest in the farm to D. This conveyance, as a severance, terminates the joint tenancy between (A and B) and (C) and creates a tenancy in common form of ownership between (A and B) and (D). Since they have done nothing to change (sever) their form of ownership, a joint tenancy still remains between A and B. Thereafter, if A dies and has made no conveyance of his interest, B would receive A's interest in the farm through right of survivorship. The result: B and D own the farm as tenants in common, i.e., B owns a two-thirds interest and D owns a one-third interest in the property. The unities of time, title, and interest have been destroyed and only the unity of possession remains.

EXAMPLE:

X →	gives by will →	A, B, C →	C →	to D
dies	property	joint tenants	conveys his ⅓ interest and severs the joint tenancy	

Result: A and B own a two-thirds interest in the farm and remain joint tenants (each owns a one-third undivided interest). A tenancy in common now exists between (A and B) and (D), who owns the other one-third.

Later:

A →	B receives A's $^1/_3$ interest →	B and D are tenants in common
dies	as surviving joint tenant	$^2/_3$ interest for B $^1/_3$ interest for D

As tenants in common, on the death of either B or D, the decedent's interest in the farm passes by will or inheritance to his beneficiaries, heirs, or devisees (see the discussion of tenancy in common below).