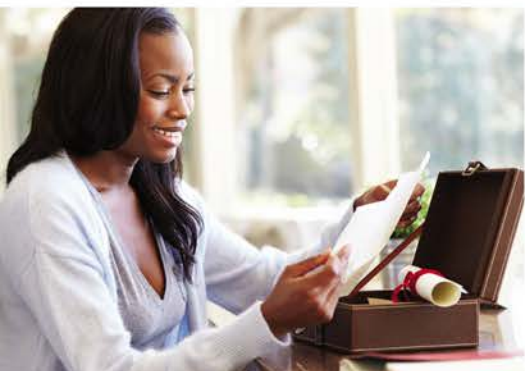


# WILLS, TRUSTS, AND ESTATE ADMINISTRATION

**EIGHTH  
EDITION**



DENNIS R. HOWER  
JANIS L. WALTER  
EMMA R. WRIGHT

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EDITION



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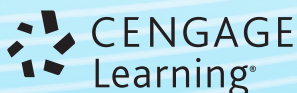
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*I dedicate this book to my husband, Roger Wright, and my parents, Rosalind Walter and Julius Walter. Without their patience, support, and understanding, but most importantly, their love, the ability to even undertake the writing of this book would have been impossible. Thanks for always being there!* —JW

*To Mom and Dad—for always seeing the best in me; to Pete—my constant inspiration and the greatest little brother there ever was; to Andrew—for the love and laughter you bring to my life. May you all have the great amount of joy in your lives that you have brought to mine.* —EW





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# 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 over the last 10 years. 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 this edition of *Wills, Trusts, and Estate Administration* Eighth Edition 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 updating the discussion of inheritance rights for same-sex couples, estate tax changes, and the disposition of digital assets. 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 eighth 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, and “What You Do” lists and “You Must” notations in the Estate Administration chapter emphasize and clarify the actual procedures and specific tasks the paralegal student must master to attain confidence and competency.
- *Ethical Issues.* These issues are found throughout the text to 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 revised to correspond to the changes in content within the chapters.
- *Case Problems.* These actual cases and hypothetical problems are included at the end of the chapters to enable the 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 type skills required in the law office. Many incorporate the Internet as a research tool to familiarize students with situations they will encounter as a practicing paralegal.

## CHANGES IN THE EIGHTH EDITION

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- *New legal topic.* The eighth edition includes a discussion of the disposition of digital assets. This topic is being overlooked by many practitioners in estate planning and administration despite the prolific use of social media, email, and digital accounts. Sample 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 eighth 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.* Chapter 11 on taxes and pertinent charts have been updated to reflect current tax regulations.
- *Uniform Probate Code.* The Uniform Probate Code is available at law libraries; state versions can 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

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### Instructor Companion Site

The online [Instructor Companion Site](#) provides the following 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
- Case briefs
- Answers to text questions
- Test bank and answer key

#### PowerPoint Presentations

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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Please note that the Internet resources are of a time-sensitive nature and URL addresses may often change or be deleted.

## ACKNOWLEDGMENTS

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# THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

# 1

## Outline

Scope of the Chapter

Property: Terminology and Classification

Real Property

Personal Property

Probate Property or Probate Estate

Nonprobate Property or Nonprobate Assets

Digital Assets and Their Effect on Estate Planning

Statutes That Govern the Passage of Property

Forms of Property Ownership

Tenancy in Severalty—Ownership by One Person

Forms of Concurrent Ownership—Ownership by Two or  
More Persons

Estates in Real Property

Freehold Estates

Leasehold Estates

## 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 and understand the terminology associated with property law.
- Distinguish the various forms of ownership of real and personal property and explain the requirements for their creation and function.
- Understand and explain why courts do not favor the creation of joint tenancies between parties other than spouses.
- Identify the community property states and differentiate between community and separate property.
- Explain the kinds, methods of creation, and characteristics of estates in real property.

## SCOPE OF THE CHAPTER

---

### inheritance

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

Everyone owns some kind of property, e.g., a home, 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.

## 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 in the earth.

### 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 since by simply unplugging it, it could be moved at will.

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 1.1

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

**deed**

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

**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:

- *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, 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

**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.



owner although the legal title is placed in possession and control of the trustee.

- **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 divest 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).
- **Divest 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 *divest (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.

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

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.

**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	Negotiable instruments (checks and promissory notes)
Life insurance proceeds	Government benefits such as Social Security and veterans' benefits
Patent rights	
Copyrights	Individual retirement accounts
Trademarks	Claims against another person for debts, property damage, personal injury, or wrongful death
Royalties	
Bitcoin	Frequent flier miles
Podcasts	Online poker account
Blogs	Electronic mail

ASSIGNMENT 1.2

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 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*

**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.

**probate property**

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

**severalty (tenancy in severalty)**

Ownership of property held by one person only.

## 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.

**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 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.

**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, would be probate property and would pass to her named beneficiaries or devisees if she has a will or to her heirs if she died 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)

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).

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, journals. There has been a major shift in how we preserve our data with much now being stored electronically through email, photos, music, blogs, social media accounts, software licenses, and financial management accounts. Combined, these digital assets make up one's digital estate. Unfortunately, there is no common

### 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.

### 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.

## 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 data 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.

definition of what constitutes a digital asset. The Uniform Fiduciary Access to Digital Assets Act (UFADAA), states that digital assets “mean a record that is electronic.” The UFADAA goes on to define electronic as “technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” Simply put, a digital asset is any digitally stored content, including online accounts, owned by an individual. With the proliferation of digital technology, a major portion of an estate may include digital assets. The problem is the lack of access to these assets. Most are password protected, and accessing them may violate federal felony laws under the Electronic Communications Privacy Act. With the passage of the UFADAA, fiduciaries may have the legal right to gain access to these accounts. Unfortunately, the UFADAA has only been adopted by a few 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.

## 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 his or her 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 1.1 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.

### ASSIGNMENT 1.3

1. Define the following new words contained in the New York statute (Exhibit 1.1) 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 1.2 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, or may dispose of it at death through a will. If no such **disposition** has taken place

#### **disposition**

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



## EXHIBIT 1.1

## 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



EXHIBIT 1.2

Forms of Property Ownership

Real or personal property can be owned:

By one person (individual ownership)

- Tenancy in severalty

or

By two or more persons (concurrent ownership)

- Joint tenancy
- Tenancy in common
- Tenancy by the entirety
- Community property

at the time of death, the property remains in the owner’s estate and passes to certain specified takers under intestate succession statutes.

**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:**

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*).

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:

<b>Blackacre—a farm</b>		<b>Blackacre</b>	Sam and Ruth are joint tenants who concurrently own Blackacre. Ruth dies. Sam owns the undivided whole property in severalty (single ownership).
<div>Sam   Ruth</div>	→ Ruth dies →	<div>Sam</div>	

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, 2015, 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, 2015, 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 1.4

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 *Clever* 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 1.5

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, although 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, 2015 (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).

**ASSIGNMENT 1.6**

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?

The legal document in Exhibit 1.3, a deed, is executed to illustrate the creation of a joint tenancy with the required four unities. The type of ownership a 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, 2015—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.

## ASSIGNMENT 1.7

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**

### 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.)

#### 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).

## ASSIGNMENT 1.8

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?

## EXHIBIT 1.3

## 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 1, 2015

[illegible]

----- 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 CININNATUS, NOW KNOWN AS CININNATI, 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.

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 April, 2015.

/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, 2015 by Henry J. Smith and Sarah M. Smith to be true and accurate.

My Commission Expires:

\_\_\_\_\_  
NOTARY PUBLIC

**This Instrument Prepared by:**

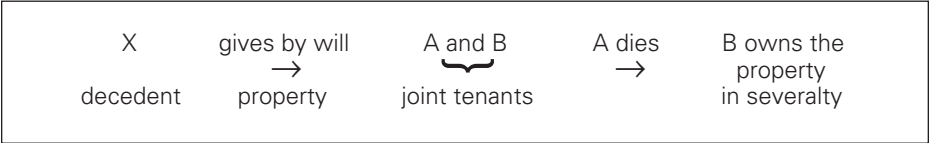
Rachel Hensley, Attorney at Law  
944 Ravine Street  
Cincinnati, OH 45202

## 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 his or her equal interest in the property during his or her 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.)

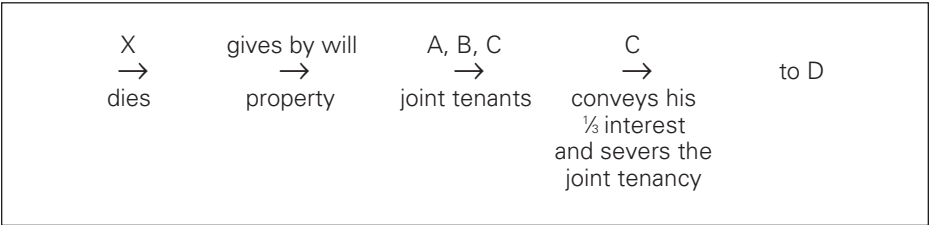
**EXAMPLE:** To illustrate joint tenancy ownership, suppose X dies and gives by will a farm to A and B as joint tenants. If during their lifetimes neither A nor B conveys

(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.



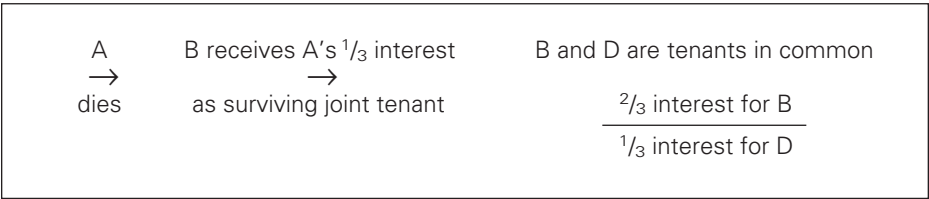
Assume that X dies and gives by will the farm to A, B, and C as joint tenants. C later conveys, by deed, his undivided one-third interest in the farm to D. This conveyance, as a severance, terminates the joint tenancy between (A and B) and (C) and creates a tenancy in common form of ownership between (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:



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:



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).

ASSIGNMENT 1.9

Apply the previous illustration to the following cases and then answer the questions.

**Case 1.** Alice dies. In her will she leaves her farm, Blackacre, to her three nephews, Able, Baker, and Charlie, as joint tenants. Able is married and has 11 children; Baker is divorced and has two children; and Charlie is a bachelor. Able dies. His will leaves



all his property to his wife, Agnes. Who owns Blackacre? What form or forms of ownership exist between the owners?

**Case 2.** Continue with the facts of Case 1; however, Able sold and deeded his interest in Blackacre to Dolan, and Charlie gave and deeded his interest to Elaine, his girlfriend. Who owns Blackacre? What form or forms of ownership exist between the owners? What happens to Baker’s interest in the property when he dies? Does Able’s wife, Agnes, have any interest in Blackacre?

Creation of a Joint Tenancy

Today, state statutes determine whether a joint tenancy is legally created. Most states recognize joint tenancy, but they vary in the express language they require to create it. Proper use of the mandatory words and the intent of the creator of the joint tenancy determine whether a binding joint tenancy is established. For example, if Alex Huang wants to give his lake cottage to his two children, Phillip and June, he may satisfy the statutes in most states by writing in the deed of conveyance, “to my two children, June Huang and Phillip Huang as joint tenants.” Other states require more, such as “... as joint tenants with the right of survivorship” or, as some documents are written today, “... as joint tenants with the right of survivorship and not as tenants in common” (see the Illinois statute below). Louisiana has no joint tenancy with survivorship rights. See the forms of ownership by state in Exhibit 1.4.

EXHIBIT 1.4 Forms of Ownership by State

By One Person		By Two or More Persons		
Tenancy in Severalty	Tenancy in Common	Joint Tenancy	Tenancy by the Entirety	Community Property
All states	All states	All states except as follows: Alaska—for personal property only Louisiana— not recognized Ohio—called survivorship tenancy Oregon—equivalent only if language reads “tenancy in common with the right of survivorship” Texas—for real property owners must sign a joint tenancy survivorship agreement	Arkansas, Delaware, Florida, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Montana, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, Wyoming Alaska, Illinois, Indiana, Mississippi, New Jersey, New York, North Carolina, Oregon—for real property only	Arizona*, California*, Idaho, Louisiana, Nevada*, New Mexico, Texas, Washington Wisconsin*— recognizes marital property equivalent of community property Alaska*—recognizes community property but is a voluntary system available to residents and nonresidents *These states allow spouses to hold community property with right of survivorship.

Another variable among the states is their preference for certain forms of co-ownership of property. At one time, common law preferred the creation of a joint tenancy over a tenancy in common whenever a conveyance was unclear regarding which of these two interests was intended by the grantor. Today, in most states, the reverse is generally true, and by statute, when the intention of the parties is not clear, tenancy in common is presumed and preferred over a joint tenancy since the legislatures believe the decedent's property should pass to beneficiaries, heirs, or devisees and not to surviving joint tenants. An example of one such statute is Minn. Stat. Ann. § 500.19(2), *Construction of grants and devises*. The decision in *In re Christen's Estate*, 238 Cal. App. 2nd 521, 48 Cal. Rptr. 26 (1965), illustrates the current preference. In this case, the court stated, "To create a joint tenancy interest by will or transfer, the instrument must expressly declare the interest to be a joint tenancy." Notice the words that are required and preferred for the creation of concurrent ownership in the states of Rhode Island and Illinois.

#### R.I. Gen. Laws § 34-3-1

The law provides that conveyances made to two or more persons, whether they be husband and wife or otherwise "... create a tenancy in common and not a joint tenancy, unless it be declared that the tenancy is to be joint...."

#### III. Compiled Stat. Ann. Ch. 765 § 1005/1

The law states that the deed of conveyance must expressly provide that the property interest is granted "... not in tenancy in common but in joint tenancy...."

### ASSIGNMENT 1.10

Using your state's codes, find and cite appropriate statutes, if any, that determine the form of ownership that would be created by the following conveyances by deed: (1) "to A and B jointly," (2) "to A and B as joint owners," (3) "to A and B equally," (4) "to A or to B," (5) "to A and to B." If your statutes or case law do not address this problem, find a statute from another state that does. Find and cite your state statute that determines the required words to create a joint tenancy or a tenancy in common.

### Advantages and Disadvantages of Joint Tenancy

When working with clients, you will discover they frequently have created joint tenancies with spouses and others. When you discuss the following advantages and disadvantages with the client, *you must be careful not to attempt to respond to questions that seek legal advice or interpretations*. All such questions must be referred to your supervising attorney.

#### Advantages of a joint tenancy

- On the death of a joint tenant, title passes automatically to the surviving joint tenant(s) by right of survivorship.
- It avoids probate. No corresponding expenses and delays are necessary or required for the surviving joint tenant(s) to acquire title.
- Title passes to the surviving joint tenant(s) free of the claims of the decedent's creditors unless the joint tenancy was created to defraud creditors. The decedent's real estate is subject to certain unpaid debts, such as mortgages, property taxes, and liens, e.g., a mechanic's lien for work or improvements to the property.

### Ethical Issue

- If the joint tenants are spouses (but see tenancy by the entirety below), no federal gift tax is owed because of the unlimited marital gift tax deduction (this may also be true for state gift tax concerns). See discussion in Chapters 11 and 14.
- If real property located in other (foreign) states is in a joint tenancy, ancillary administration may be avoided (see discussion in Chapter 7).
- Joint tenancy of bank accounts, which include checking, savings, certificates of deposit, Totten trusts, and POD accounts, that are properly and legally created to establish the right of survivorship for the named co-owners or beneficiary, can avoid probate and provide immediate cash for family needs on the death of a spouse or parent. You must be careful to ensure the account is correctly created, e.g., all signature cards executed and state statutory requirements met.
- Creation of a joint tenancy is fast and inexpensive, whereas probate and the creation of a trust are expensive.

#### Disadvantages of a joint tenancy

- The person who creates the joint tenancy no longer has complete control of the property.

**EXAMPLE:** Shirley is a single parent who has a teenage son, Zachary. Shirley buys a house in joint tenancy with Zachary. A wonderful job opportunity becomes available in another state, and Shirley must immediately sell the house. Since Zachary is a minor and cannot convey real property, a court must appoint a guardian (Shirley) to represent and protect Zachary's interest in the house. However, this loss of control and subsequent delay may cause Shirley to lose the employment opportunity.

- Any joint tenant can terminate (sever) the joint tenancy without the agreement of the other joint tenant(s).

**EXAMPLE:** The mother of Andre and Rachael dies and leaves the family farm to them as joint tenants. Rachael wants to live on the farm. Andre wants to sell his interest. If Rachael cannot afford to buy Andre's interest, the farm *may* have to be sold to a third party since it is Andre's right to terminate the joint tenancy.

- The surviving recipient of the property previously held in joint tenancy may not have been the intended beneficiary.

**EXAMPLE:** In the preceding example, if Shirley died after creating the joint tenancy with Zachary, he would own the house. If Zachary was killed in a car accident a year later while still the owner of the house, the house will pass to his only heir, his father, if living, which may not be a result that Shirley intended.

- The stepped-up basis for full value of the proceeds is lost. See the discussion and example in Chapter 14.
- Other examples of problems created by joint tenancy follow.

**EXAMPLE:** Prakash, age 19, wants to buy a car but is unable to obtain a loan to finance the purchase. His parents agree to cosign the promissory note required by the bank for the loan. The parents also list themselves as joint tenancy owners with Prakash on the title of the car. While driving the new car, Prakash is the sole cause of an accident in which the driver of the other car is seriously injured. The injured driver sues Prakash and his parents. If the injured driver wins the case and receives a judgment of \$450,000 in damages, the driver can collect money damages from the personal assets of Prakash or his parents if they are not adequately insured.



decedent's interest goes to an heir or as directed in a will, and it is subject to estate administration (probate).

**EXAMPLE:** Jeff Morrow dies with a will. In the will, he gives a one-half interest in his original Picasso painting to his only living relative, his nephew Charles Morrow. Jeff gives the other half of the ownership rights in the painting to his two close friends, Aidan Byrne and Anthony Trotta, equally. Charles, Aidan, and Anthony are co-owners of the Picasso painting as tenants in common. If Aidan Byrne dies, his one-fourth interest in the painting is transferred according to his will, if he has one, or to his heir (closest blood relative, if he is not married) according to state law.

Not only may tenants in common own different interests in terms of quantity and duration, but they may receive their interests from different parties through different instruments of conveyance at different times. Nevertheless, they retain an undivided interest in the property unless it is merged or severed.

### Creation of a Tenancy in Common

A tenancy in common may be expressly created as in the deed in Exhibit 1.5, but as previously mentioned, a tenancy in common is also created when a grantor makes a conveyance and fails to use the terminology required to establish a joint tenancy. In addition, once a joint tenancy is validly established, if one of the joint tenants makes an *inter vivos* conveyance by deed to another person, the joint tenancy is severed, and a tenancy in common is created for the new owner (see the examples below).

**EXAMPLE:** Most states today prefer the establishment of tenancy in common over a joint tenancy. Therefore, if Simon Ackerman dies and provides in his will that Blackacre is to go "to my sons, Cameron and Joel jointly in equal shares," the real property will pass to the two sons as tenants in common in states with such a preference. Note that the conveyance did not contain an explicit statement saying that a "joint tenancy" was to be created.

**EXAMPLE:** In another case, suppose Simon Ackerman creates a valid joint tenancy in his will that states that Blackacre goes "to my sons, Cameron and Joel, as joint tenants with the right of survivorship and not as tenants in common." Simon dies. Cameron and Joel are joint tenants. Joel, by deed, sells his interest in Blackacre to Thurston Brown. The result is the original joint tenancy is severed by Joel's *inter vivos* conveyance and a tenancy in common is created between Cameron and Thurston.

### ASSIGNMENT 1.11

1. If Kaimi conveys one-third of his farm, Blackacre, to Craig on August 15, 2015, and the remaining two-thirds to Danny on September 20, 2015, what form of ownership will Craig and Danny have according to the statutes or case law in your state?
2. If Ashley and Eric are joint tenants, and Eric gives his interest in the property to Tim by a valid conveyance, what form of ownership exists according to your state law?

The state of New York, by statute, handles the transfer of property to two or more persons in the following way.

#### N.Y. Estates Powers and Trusts Law § 6-2.2

When Estate Is in Common, in Joint Tenancy or by the Entirety.

## Sample Deed Showing Creation of Tenancy in Common

Date: September 12, 2015

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

Prior Instrument Reference: Volume 10, Page 27.

Executed this 11th day of April, 2015.

/s/ Sally J. Jones  
SALLY JONES, Grantor

COUNTY OF HAMILTON  
STATE OF OHIO

This instrument was hereby acknowledged before me on the 11th day of August, 2015 by Sally J. Jones 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

- (a) A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy.
- (b) A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common.
- (c) ...
- (d) ...
- (e) A disposition of property to two or more persons as executors, trustees or guardians creates in them a joint tenancy.
- (f) Property passing in intestacy to two or more persons is taken by them as tenants in common.

**EXAMPLE:** Jin-Sang, a resident of New York, dies without a will. Her husband, Yejoon, died a year earlier. She leaves a house, which is in her name only, and no debts. Her children, Yi and Min-soo, are entitled to the house in tenancy in common under the law of descent and distribution of the state of New York.

## ASSIGNMENT 1.12

1. Susan Sowles, a resident of New York, dies without a will. If she has a lakeshore cottage in New York and her heirs are her three children, what form of ownership of the cottage results for their benefit?