BASIC INTRODUCTION TO ESTATE PLANNING AND PROBATE PRACTICE FOR PARALEGALS

Beth R. Pless, J.D.

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Basic Introduction to Estate Planning and Probate Practice for Paralegals

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TABLE OF CONTENTS

Licensing

A detailed breakdown of this resource's licensing can be found in ***Back Matter/Detailed Licensing***.

CHAPTER OVERVIEW

1: Introduction to Estates and Probate Practice

1.1: Basic Introduction to Estate Planning and Probate Practice

As we live our lives, we hope to accumulate property, to take care of our bodies and minds, and (in some cases) raise children. While we are living and healthy, we value being able to make decisions about finances, property, health care, and raising our children. However, circumstances can happen that can impact our ability to do these things. We hope others will handle these matters according to our wishes if we become incapacitated and when we die. The only way to assure that will happen is through estate planning.

What is an Estate Plan?

Most people desire to make known their wishes about what will happen to their property, bodies, and/or children in the event they are unable to express their wishes or upon their death. That's where estate planning comes in. An **estate plan** is a set of legal documents that present a person's wishes for the distribution of property, guardianship of minor children, and healthcare decisions. It is an arrangement of a person's assets using the laws of various disciplines to gain maximum financial benefit for the disposition of the person's assets during life and after death.

Definition: Estate Plan

Estate plan: A set of legal documents that present a person's wishes for the distribution of property, guardianship of minor children, and healthcare decisions. It is an arrangement of a person's assets using the laws of various disciplines to gain maximum financial benefit for the disposition of the person's assets during life and after death.

Laws and regulations regarding property ownership and distribution, insurance, wills, trusts, taxes, healthcare, and guardianship/custody of children and incompetent or disabled family members all have a role to play. Comprehensive estate planning can involve the services of a variety of professionals, including attorneys, accountants, financial planners, and life insurance representatives.

Typical Paralegal Estate Planning and Probate Practice Tasks and Responsibilities

As with most practice areas, paralegals working with estate planning and probate attorneys are responsible for many different types of tasks, including:

- Pre-client screening and conflicts-checking
- Client interviews
- Opening and managing the client's internal file
- Assisting the client with locating, obtaining, producing, and organizing information and documentation relevant to the client's legal matter
- Drafting legal correspondence to the client, witnesses, court personnel, and other parties/counsel involved in the client's legal matter
- Conducting factual investigation and legal research regarding the client's legal matter
- Drafting estate planning documents, probate forms, and other documents necessary to fulfill the agreed-upon legal services to the client
- Receiving, organizing, and summarizing documents and other information received from third parties in response to interviews and document requests
- Acting as liaison between the client and the attorney with respect to providing legal information to the client and requesting legal advice from the attorney
- Maintaining contact with financial and other experts as needed to effectuate the attorney's plan and client's wishes
- Assisting the attorney with probate proceedings
- Managing deadlines, calendars, and tasks lists relating to the client's legal matter
- Staying current in State and Federal laws, regulations, and case law impacting the client's legal matter

Estate planning and probate is one of the most client-contact intensive practice areas for paralegals. Because it deals with death, dying, and property ownership, it can also be one of the most emotionally charged practice areas. As such, successful paralegals practicing in this area of law have strong empathy and interpersonal skills, as well as the ability to set aside personal biases toward various situations or diverse persons. Maintaining healthy work/life balance by placing appropriate boundaries and compartmentalizing are also key to a rewarding practice. Other personal attributes and skills necessary to providing effective legal services include strong written and oral communication skills, attention to detail, time management skills, ability to work independently and as a member of a legal team, flexibility, adaptability, ability to work in a fast-paced and sometimes stressful environment, and well-developed research and investigation skills.

Estate Planning Terminology

Before diving into the details of estate planning, there is quite a bit of terminology with which you should become familiar.

> **Definition: Terms Relating to Estate Planning**
>
> **Estate**: all property owned at death before it is distributed by will, trust, or intestacy laws. An estate may contain real property and personal property.
>
> **Heir**: a person entitled by law (e.g., spouse, children, or other family members) to a person's property after death
>
> **Beneficiary**: someone receiving property or money pursuant to an estate planning tool
>
> **Contingent beneficiary**: someone who will receive property or money only if one or more conditions occur or are satisfied
>
> **Fiduciary**: a person appointed to serve in a position of trust, who controls and manages property exclusively for the benefit of others
>
> **Inter Vivos/Non-Testamentary**: during life
>
> **Testamentary**: after death
>
> **Testate**: death with a will, trust or will substitute
>
> **Intestate**: death without a will, trust or will substitute
>
> **Testator/Testatrix**: a person who makes a will
>
> **Settlor/Grantor**: a person who makes a trust
>
> **Administration of an Estate**: Any proceeding relating to the settlement of a decedent's estate, whether testate or intestate.
>
> **Probate**: court procedure in which a will is "proved" and the decedent's estate is collected, managed and distributed

Additional terminology will be provided in later chapters.

Ethics in Estate Planning and Probate Law Practice

As with all practice areas, the American Bar Association's Model Rules of Professional Conduct and Wisconsin's Rules of Professional Conduct apply to Estate Planning and Probate Law practice. Attorneys are responsible for their own conduct and have the duty to ensure personnel they supervise – associate attorneys, paralegals, and other legal staff – do not engage in conduct that would violate the rules. While all of the rules apply, it is helpful to examine the rules that come up the most often and that can be particularly troublesome in an Estate Planning and Probate Law practice.

Rule 1.1: Competence

This Rule requires legal practitioners to provide clients with competent representation, which is defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Wisconsin Supreme Court Rule 20:1.1). As mentioned above, estate planning can sometimes implicate other areas of law; thus, it is important that legal practitioners do not attempt to represent clients in complex legal matters requiring legal knowledge and skill outside of their actual competence. For example, Bankruptcy is a highly specialized area of law that could come up when advising clients who have a significant amount of debt. Legal practitioners without training and experience in Bankruptcy law should consider referring clients with potential Bankruptcy concerns to a bankruptcy attorney.

Rule 1.4: Communication

This rule requires legal practitioners to keep clients informed about their legal matters by promptly communicating and consulting with clients and providing information as requested. (Wisconsin Supreme Court Rule 20:1.4). Especially in an emotionally-charged probate matter, clients are much more satisfied with their representation – and much less likely to lodge ethical complaints – when they are regularly informed about the status of their case.

Rule 1.5: Fees

This rule requires legal practitioners to charge reasonable fees based on time, labor, and skill required to competently perform the desired legal services (among other factors). The rule also requires that the scope of the representation and how the fee is calculated be explained in writing unless the total cost will be less than $1,000. Most fee agreements for estate planning involve a flat or fixed fee, depending on the number and complexity of documents being drafted. Probate matters are typically based on hourly charges for attorney and paralegal time. In probate matters, a chargeable advance fee (also sometimes called a retainer fee) may be collected when the client signs the fee agreement. The amount of the advance/retainer fee varies, but its purpose is to act as a "deposit" sufficient to cover anticipated costs and time required for at least the early stages of the representation. Fees for time spent by attorneys and paralegals are deducted from (or charged against) the advance/retainer fee at first, and then are typically billed to the client monthly.

Rule 1.6: Confidentiality

This rule prohibits legal practitioners from ever revealing or disclosing any and all information relating to the client's representation, regardless of the source of the information, without the client's express consent. This means that, when it comes to estate planning, the client's family members are not entitled to receive any information about the client's estate plan unless the client consents. During a probate, the client is the person who hired the lawyer. Sometimes, it is the Personal Representative of the deceased person's estate; other times, it is an heir or beneficiary of the deceased person. Regardless of who the client is, information should not be shared with anyone other than the client without the client's prior consent.

Attorney-Client Privilege

Although not technically an ethical rule, the attorney-client privilege is one of the ways confidential client communication is protected. The privilege prohibits disclosure of any communications (written or oral) between the client and the attorney or the attorney's staff that relates to legal services provided to the client. This privilege becomes effective if confidential information is obtained, even if the person does not subsequently retain the law office in the legal matter. For that reason, it is important not to obtain confidential information from persons until they have signed our fee agreement officially establishing a paid attorney-client relationship.

Attorney Work Product Protection

The attorney work product rule protects activities performed by the legal team on the client's behalf from disclosure. Protected activities include factual investigation, legal research, notes, memoranda, strategies, preparation and organization performed by the attorney, paralegal, or other legal staff.

Rule 1.7: Conflicts of Interest – Current Clients

This rule prohibits representation that is adverse to or could injure the interests of another client. The rule requires legal practitioners to avoid situations in which they may need to choose between the interests of:

- multiple current clients
- a current client and a former client or other person from whom the legal practitioner has obtained confidential information
- a current client and the business or personal interests of the legal practitioner (Wisconsin Supreme Court Rule 20:1.7).

Abiding by this rule can be tricky during estate planning and probate. Here are some ways a conflict of interest between a current client and others can arise:

Example 1.1.1

The attorney is drafting an estate plan for both spouses. One or both of the spouses want to secretly give part of their estate to a child or someone else outside of the marriage without the other spouse's knowledge. Each client is entitled to confidentiality regarding their desired estate plan; however, each client also is entitled to be informed of the nature of the property they own and their right to determine its distribution, especially if the property was acquired during the marriage.

Example 1.1.2

The attorney is drafting an estate plan and is contacted by one or more persons who may be heirs or beneficiaries of the estate (or who want to be). Great care must be taken to communicate to the person(s) that the testator/settlor/grantor is the client, and the attorney does not represent and will not provide legal advice to any other persons who might be heirs or beneficiaries of the estate.

Example 1.1.3

The attorney is drafting an estate plan, and the testator/settlor/grantor wants to give the lawyer (or a member of the attorney's staff) a gift in the will or trust, when the person receiving the gift is not otherwise an heir. This can raise suspicions of undue influence by the attorney and can lead to a conflict of interest later on if one of the client's heirs or beneficiaries seeks to challenge the will during probate after the client has died. Similar problems arise when the testator/settlor/grantor wants to name the attorney/staff member as personal representative or trustee.

Example 1.1.4

During probate, a conflict of interest can arise when there are several people who have or who are attempting to claim an interest in one or more items of the decedent's property. Again, great care must be taken to establish who the client actually is and to make other persons aware that the attorney does not represent them and will not provide legal advice to anyone other than the client. Once a conflict becomes apparent, the attorney must inform each person of the need to retain independent legal counsel, and the attorney could be disqualified from further representation if confidential information was already obtained from a potentially adverse party.

Equally important is the need to avoid the **former client/current adversary** conflict of interest. In estate planning and probate practice, the two most common ways this conflict can arise are:

Example 1.1.5

The attorney drafted an estate plan for both spouses. One spouse later contacts the attorney to have their estate plan modified in a way that is detrimental to the other spouse. Since the purpose of reciprocal or mutual estate plans is to make sure that each person inherits the other person's estate, the modification may require the attorney to act in a way that is not in the best interests of a client for whom the attorney provided legal services.

Example 1.1.6

The attorney drafted a will for a client, who is now deceased. An heir or beneficiary of the deceased wants to hire the attorney to challenge the will, or a portion of it, or wants someone other than the person nominated in the will to be the personal representative. Again, this asks the attorney to act in a manner that is contrary to what a former client (who is now deceased) directed the attorney to act when drafting the will.

Rule 4.2: Communication with Person Represented by Counsel and Rule 4.3: Dealing with Unrepresented Person

These rules govern contact with persons involved in the legal action who are not clients. Typically, these are opposing parties. If the opposing party is represented by an attorney, all communication between our law office and that party must occur through and be directed to that party's attorney. When the opposing party is **pro se** (self-represented without an attorney), our office is required to inform that party that we do not represent that party and cannot give that party legal advice of any kind (other than advice to retain another attorney). (Wisconsin Supreme Court Rules 20.4.2 and 20:4.3). Many times, a beneficiary or heir in a probate matter may decide not to hire their own attorney as a way to save money. In that situation, it is imperative to inform that party in writing that we do not represent that party, that our client's interests may be adverse or in conflict with that party's interests, and that we are prohibited from representing that party or providing legal advice.

Unauthorized Practice of Law

As you've learned in other classes, there are certain tasks and activities that can only be performed by a licensed attorney; anyone else who performs them has engaged in unauthorized practice of law, or UPL. Non-lawyers are prohibited from doing the following:

- **Accepting or rejecting a client/legal matter.** In other words, establishing the attorney-client relationship, communicating an intent to establish (or not establish) it, and signing fee agreements, contracts, or correspondence relating to establishing (or not establishing) an attorney-client relationship
- **Setting legal fees.** Only the attorney is allowed to decide the amount and manner (hourly, flat fee, task-based, etc.) in which to charge a client for legal services.
- **Providing legal advice.** Legal advice includes recommending actions or inactions, interpretation of law or documents, evaluation of legal claims or likelihood of success, explaining legal rights or obligations, and the like.
- **Preparing legal documents without attorney supervision.** In other words, any document, pleading, letter, etc., must be reviewed and approved by the attorney before it leaves the law office.
- **Representing clients in Court.** This not only includes personal appearances at hearings or trials but also signing pleadings, motions or other legal documents to be filed in the Court.
- **Terminating the attorney-client relationship.** Only the attorney can determine whether a legal matter has been concluded according to the retainer/fee agreement and communicate its completion with the client. This restriction especially applies to decisions to terminate the attorney-client relationship before the conclusion of the legal matter, for whatever reason.

Now you have a basic understanding of what is involved in an ethical estate planning and probate practice. The next chapter will introduce you to the process of estate planning.

1.2: Basic Introduction to the Estate Planning Process

After the office has successfully completed a conflicts-check and the attorney has accepted the client, the first step is to schedule a more in-depth legal consultation between the attorney and the client to confirm the nature of the legal services the client desires. Sometimes clients are confused about the law and what they want, and sometimes their perception of what estate planning and probate matters involve is distorted by the media, social media, and what they've heard from friends and family. Incorrect or incomplete information about legal options is usually addressed during the initial legal consultation with the attorney prior to the in-depth interview. As a result, clients sometimes change their minds about what they want, even after the representation has begun. Once the attorney and client have agreed to the legal services that will be provided and the client has signed the fee agreement (and paid any required upfront attorney fee), it is time to begin the process of collecting information necessary to the client's legal representation.

Goals/Purposes of Estate Planning

Before getting into details about the information needed from clients, and how to obtain it, it is helpful to understand the goals and purposes of estate planning. Creating an estate plan ensures that a person's property will be preserved for and distributed to the people whom the person desires to benefit from their property, and that those who are benefiting from the property receive the largest distribution possible with a minimum amount of delay. Specifically, estate planning allows an individual to decide exactly who will benefit from their estate, and to what extent. Estate planning also ensures that the estate will not be destroyed by expenses related to illness, disability, infirmity, or death, nor by taxes imposed on the transfer of assets at death. Finally, estate planning allows the client, rather than the court, to make important decisions regarding who should be in charge of the estate and whether that person should be allowed to serve without a bond.

Estate planning also encourages individuals to make important decisions with respect to financial transactions and healthcare during life. Disability that renders a person incapable of or incompetent to make financial and health care decisions can happen at any time, and often arises very suddenly. A comprehensive estate plan includes documents to provide for decision-making authority if the person is unable to do so. Decisions regarding healthcare preferences, organ donation, funeral arrangements, and the final disposition of one's body can also be documented.

Estate planning is also important for persons with children or other dependent family members. Various documents can assist with appointing a guardian/custodian for minor children and/or incompetent family members as well as providing for the care, support, and education of family members after a person dies. If a person leaves behind minor children or other incompetent dependents without naming a guardian in a will or trust, the probate court will have to choose a guardian and will likely place any money or property passing to those persons in a guardianship account. Having a judge decide who will care for and raise minor children or incompetent dependents can be emotionally wrenching for other family members. Also, court-supervised guardianships entail extra costs. A comprehensive estate plan can avoid this upset and expense by naming a guardian.

There are many documents involved in an estate plan, and they generally fall into the following categories:

- **Non-testamentary estate planning tools:** documents and distributions that are effective and occur while the person is still alive. Examples include
  - Durable General Power of Attorney for property and finances
  - Healthcare directives such as a Health Care Power of Attorney, Letters of Instruction, Advance Medical Directives, Living Wills, and Do Not Resuscitate Orders
  - Long Term Care Insurance and Disability Insurance
  - *Inter Vivos* Trusts
  - Lifetime gifts and charitable donations
- **Testamentary estate planning tools:** documents and distributions that are effective and occur only after the person dies. Examples include
  - Wills
  - Testamentary trusts
  - Will substitutes, such as life insurance, transfer/pay on death (TOD/POD) designation, Powers of Appointment, ownership of property in joint tenancy
  - Organ and tissue donation
  - Funeral trusts and instructions

> ✎ Definition: Non-testamentary Estate Planning Tools
>
> **Non-testamentary estate planning tools:** documents and distributions that are effective and occur while the person is still alive.

> ✎ Definition: Testamentary Estate Planning Tools
>
> **Testamentary estate planning tools:** documents and distributions that are effective and occur only after the person dies.

These documents will be discussed in later chapters.

Compiling a Family History

Estate planning and probate matters typically involve issues regarding finances, property ownership, income, debts, and expenses. Additionally, relational, psychological, and social dimensions of the client's life are also implicated. Thus, competent representation of estate planning and probate clients often requires an enormous amount of fact-gathering that is sometimes equivalent to the client's life history.

Interviewing Guidelines

An effective interview process will not only help clarify what the client wants from the legal representation but will also collect the information needed to accomplish the client's goals. The in-depth client interview should occur only after the client has officially hired the law office by signing a fee agreement and paying any required up-front fee. Typically, at this point, the client has stated what they want/need the lawyer to do.

Although your primary purpose in conducting the interview is to obtain needed information from the client, an equally important purpose is to gain the client's trust and confidence in you as a professional, to assure the client that their legal matter is important, and to demonstrate acute sensitivity toward the client's feelings and experiences which may be embarrassing, frustrating, or anger-provoking. You'll also want to make sure you schedule plenty of time (usually an hour or more) for the interview. Here are some things to keep in mind when conducting that interview:

1. **Prepare an appropriate space**. Make sure the interview takes place in a private space so that all information remains confidential. For a web-conference interview, make sure both you and the client are in private spaces, and use a secure network (not public wi-fi) and a secure web-conferencing platform. If the client is coming in person, reserve a private conference room at the office supplied with writing materials, water (or coffee, juice, or soda), and a box of facial tissues; make sure the client is comfortable. Turn on "do not disturb" for electronics and other devices and take other steps to prevent interruptions. Make sure there are no other files or papers lying open in the interview space.
2. **Formulate responses to client questions to which you cannot respond.** It's practically guaranteed that clients will ask questions you are ethically not allowed to answer. Having prepared responses will give you confidence to respond without feeling awkward. For example,
   - "As a paralegal, I don't have as much knowledge and skill as the attorney, so I can't answer that question as it involves legal advice. I'll be sure to refer that question to the supervising attorney."
   - "Every case is different, so I can't predict how long the case will take, what it will cost, or what the outcome will be. Rest assured that our office will use its skills and expertise to seek the best outcome in the most efficient way possible."
3. **Prepare yourself for the interview.** Review the information from the client's initial intake form and legal consultation. Make sure you have the appropriate interview checklist and other documentation ready before the interview begins. If you will need the client to sign releases, complete those documents and have them ready for the client's signature.
4. **Begin with required disclosures**. Make sure the client understands the following:
   - As a paralegal, you cannot give legal advice. You will be working closely with the attorney handling the client's legal matter.
   - Although you can provide general information about procedures, you cannot predict costs, time required, or results for their legal matter.
   - You need to take detailed notes during the interview to ensure you have complete and accurate information.
   - Complete and honest answers are critical to the successful representation of the client's interests; remind the client that all information will remain confidential.

5. **Obtain permission before recording the interview.**
   - Before recording the interview, get permission to do so from both the supervising attorney and the client.
   - Once you receive permission to record the interview, start the recording with the following information:
     - Name of the client and any other relevant information about the client (for example, mention that the client hired the law office to obtain a divorce)
     - State your name and the names of any other persons who are present
     - Identify the date, time, and place of the interview
     - Ask the client for permission to record the interview. Wait to begin asking your questions until after you have received permission
   - Keep in mind that while there are benefits to recording an interview, the downside is that sometimes clients feel uncomfortable or may be less open and forthcoming when they know they are being recorded. Many times, the downsides of recording outweigh the benefits.
   - Even if you don't plan to record the interview, let the client know you will be taking notes to share with your supervising attorney
6. **Use empathetic and active listening techniques**.
   - Maintain eye contact as much as possible (unless doing so would make the client especially uncomfortable).
   - Encourage the client to speak freely and explain answers beyond one or two words (tell me about that; help me understand …)
   - Repeat back portions of what the client has just told you to demonstrate listening and understanding (this may also encourage more details from the client)
   - Refer back to previous information as the basis for follow-up questions
   - Use language the client understands, and check for understanding if you are using legal terms (such as spousal support, maintenance, etc.)
   - Acknowledge the client's emotions and experiences before redirecting, if necessary ("I can understand why that would make you feel angry …). Take breaks when necessary to help diffuse strong emotional responses.
   - Be aware of how your tone of voice, verbal language, body language, and mannerisms may be impacting the client, particularly if the client has been a victim of abuse or domestic violence.
   - Do not "talk down to" or disparage the client.
   - Notice the client's body language and other verbal and non-verbal reactions to your questions and be prepared to adjust your interview techniques.
   - Wait for the client to finish answering the question and pay attention to all details of what the client has said.
   - Be prepared to ask follow-up questions to obtain more specific details. Refer back to previous information as the basis for follow-up questions
   - Expect the client to skip around topics, or to not tell the story in chronological order. Make sure you understand the order in which events occurred.
   - Clarify when necessary. If the client uses pronouns (he, she, they) instead of names, you may need to ask the client to confirm/use proper names rather than pronouns to refer to people.
   - Pay attention to the client's body language and mannerisms. Sometimes changes in posture, facial expression, or even tone of voice can signal the need for additional follow-up questions. If the client seems uncomfortable, it's okay to take a break.
7. **Make mental notes on the client's personality**. During the initial legal consultation, the attorney is primarily concerned with determining whether the office can help with the client's legal matter. The follow-up interview is also an assessment of the client's demeanor and to discern potential red flags. Ask yourself whether the client
   - Appears emotionally distraught or volatile, overly angry, or vengeful
   - Has unrealistic objectives or expectations, or appears to want to tell the office "how to run" the case
   - Answers questions inconsistently or avoids directly answering questions
   - Frequently rambles, wanders off topic, constantly interrupts you, or appears otherwise unable to focus
   - Seems to be compromised by a mental health condition, or is under the influence of alcohol, drugs, or medications
   - Is flirtatious or otherwise makes you feel uncomfortable
8. **Plan for needed follow-up.** Know how you will end the interview.
   - Give the client an opportunity to voice concerns or questions.
   - Let the client know it is often necessary to meet with the client more than once.

- Compile a list of documents still needed from the client. A pre-prepared checklist that allows you to use checkboxes to let the client know which additional documentation is needed is beneficial.
- Determine how to access any necessary electronic data you may need for the client's legal matter, for example, what does the client/client's family use for
  - computers/devices/phones?
  - email providers/addresses?
  - social media platforms/accounts?
  - cloud-based applications, such as Microsoft Office 365, Google Drive, etc.?
- Provide contact information for you and the supervising attorney

The Interview/Family History Checklist

Most law offices will have multiple interview checklists to be used depending on the legal matter involved. Below are the topics typically covered in checklists for various estate planning and probate matters. Obviously, not all information is pertinent to every estate planning and probate matter; similarly, this is not an exhaustive list.

Client Basic Information

- Name (current and previous), mailing address, personal email address, personal phone number, and other contact information
- Length of time at current address (if less than 5 years, previous addresses)
- Social Security number
- Date and place (City, State, Country) of birth
- Business/employer name, mailing address, email address, phone number, and webpage address
- Education (highest degree completed) and employment history
- Marital status (single, divorced, widowed, married, number of prior marriages)
- Military status
- Race and ethnicity
- Religious affiliation
- Citizenship/immigration status
- *Documents needed:*
  - Birth certificate
  - Social Security card, Medicare card
  - Passports, naturalization papers
  - Military records

Estate Planning Matters for All Clients

- Names, current contact information (address and phone), dates of birth, marital status, present health, and relationship (e.g., brother, niece, etc.), of all family members; if deceased, date of death
- Information regarding the client's financial assets and worth, including retirement funds, investments, personal property, real property, digital assets, intellectual property, and wills/trusts naming the client as a beneficiary or in which the client has power of appointment
- Does the client own any business interests? If so, include
  - Name and type of business, including organization type (partnership, LLC, etc.)
  - Detailed description of client's business interest, including operating agreements, partnership agreements, franchise agreements, etc.
  - Detailed description and value of all business assets and property
  - Detailed description and amount of all business debts, obligations, contracts, and other liabilities
- Does the client have a Safe Deposit Box? If so, specify its location. Does anyone else have a key or authority to access it?
- Advancements or other property previously transferred to family members or friends
  - Names and current contact information (address and phone) of persons to whom property was transferred
  - Detailed description of property transferred, including date and circumstances of transfer
- Information regarding existing debts or loans owed to the client by others
  - Names and current contact information (address and phone) of persons involved
  - Detailed description of debt/loan terms, including date and circumstances. Include documentation, if any

- Information regarding client’s existing debts, loan obligations, and financial liabilities, including credit cards
- Names and current contact information (address and phone) of other professionals consulted (attorneys, accountants, financial planners, funeral directors, insurance agents, religious advisors, stock brokers, tax preparers, etc.)
- Names and current contact information (address and phone) of client’s primary health care providers
- Information regarding the client’s life insurance, annuities, retirement accounts, long-term care insurance, and disability insurance including
  - Name/policy number, and type of policy
  - Face or death value (as applicable)
  - Annual premium
  - Dividends, cash surrender value, loans on cash value (if applicable)
  - Names of beneficiaries (life insurance and annuities)
- Information about the client’s casualty insurance (auto, home, boat, mortgage, etc.)
- Names and current contact information (address and phone) of persons to be named as
  - Power of Attorney for Health Care, and at least one successor
  - Durable General Power of Attorney, and at least one successor
  - Representative for Authorization for Final Disposition, and at least one successor
  - Personal Representative, and at least one successor
  - Trustee, and at least one successor (if applicable)
  - Guardians for minor child(ren) or incompetent beneficiary(ies), and at least one successor (if applicable)
- Names of desired beneficiaries, with relationship and current contact information (address and phone). Include information for charities, if applicable
- Are there any concerns about a beneficiary having a disability or being a spendthrift?
- Are there specific gifts (items of property, money, etc.) that the client wishes to give to a specific person or charity?
- Names of persons to be disinherited, with specific reasons
- *Documents needed:*
  - Previous estate planning documents (if applicable)
  - Documents demonstrating ownership or other interests in personal property, real property, business property, intellectual property, or businesses (deeds, titles, operating agreements, certificates of ownership, etc.)
  - Financial records, such as bank statements, investment statements, tax records, and retirement accounts
  - Current tax information
  - Cemetery deed, funeral trust, or other funeral documents
  - Documentation of disability of the client, if applicable
  - Court documents related to bankruptcy or other past, current, or pending litigation

Estate Planning Matters involving Clients Who Are or Were Previously Married

- All Information for the Client, above
- Current spouse’s basic information (same as Client's Basic Information)
- Are there any current prenuptial, post-nuptial, or separation contracts or agreements?
- Are there any children born or adopted into the marriage(s)?
  - Names, dates of birth, Social Security numbers, and current addresses
  - Health information, including physical/mental health conditions, special needs
  - If there is more than one marriage, which children are from which marriage
- If applicable, date of divorce(s) or annulment(s)
- Are there any concerns about a spouse or child having a disability or being a spendthrift?
- *Documents needed:*
  - Marital contracts (if applicable)
  - Divorce/annulment judgments and Marital Settlement Agreements (if applicable)
  - Documentation of disability of spouse or children, if applicable

Probate Matters

- All Information for the deceased person as listed for the estate planning client, above
- Deceased person’s date and place of death
- Deceased person's **domicile** (the place where a person intends to make their legal, permanent home) at death.
- Name and current contact information (address and phone) of personal representative/trustee. If there is no will or trust, information for the person wishing to act as estate administrator
- Names, ages, relationships, and current contact information (address and phone) of all of the deceased person’s heirs, beneficiaries, and disinherited persons
- *Documents needed:*
  - Original will or trust (if applicable)
  - Deceased person’s death certificate (and certified copies)
  - Documentation of disability of deceased person’s spouse, children, or heirs/beneficiaries, if applicable

Estate planning is for everyone, not just for wealthy persons or persons with children. The overall goal of estate planning is to make things easier for loved ones in the event of disability or upon death. These situations are challenging financially and emotionally. The last thing anyone wants is for their surviving spouse or family members to be faced with legal battles over healthcare or financial decisions, or interfamily arguments over estate assets. At a minimum, anyone 18 years or older should have documents appointing trusted persons to make health care and financial decisions in the event of an inability to do so, as well as a document directing who should receive any property owned at death. These documents should be updated after any major life change, including but not limited to marriage, divorce, birth of a child, death of a spouse or other family member, disability, changes in property ownership, or financial condition. Documents should be stored in a safe place that can be easily accessed by representatives.

The remaining chapters of this textbook will focus on laws relating to property ownership and succession, the legal requirements for estate planning documents, and probate proceedings.

CHAPTER OVERVIEW

2: Property

2.1: The Property System

As you learned in previous chapters, much of estate planning revolves around identifying, preserving, and distributing the property a person owns. The means available for achieving these goals vary depending on what type(s) of property a person owns, how the person owns each item of property, and to whom/how the person wishes to distribute each item of property. Thus, it is important for estate planning practitioners to understand:

- How property is classified;
- The different ways property can be owned, and the impact of that ownership on the person's ability to control the property during life and after death;
- The different methods of distributing property as part of an estate plan; and
- Lots of terminology!

What is Property?

Property, which seems like a commonsense concept, is difficult to define in an intelligible way; philosophers have been striving to define it for the past 2,500 years. To say that "property is what we own" is to beg the question—that is, to substitute a synonym for the word we are trying to define. Blackstone's famous definition is somewhat wordy: "The right of property is that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land." A more concise definition, but perhaps too broad, comes from the Restatement of the Law of Property, which defines property as the "legal relationship between persons with respect to a thing."

The Restatement's definition makes an important point: property is a legal relationship, the power of one person to use objects in ways that affect others, to exclude others from the property, and to acquire and transfer property. Still, this definition does not contain a specific list of those nonhuman "objects" that could be in such a relationship. We all know that we can own personal objects like iPods and DVDs, and even more complex objects like homes and minerals under the ground. Property also embraces objects whose worth is representative or symbolic: ownership of stock in a corporation is valued not for the piece of paper called a stock certificate but for dividends, the power to vote for directors, and the right to sell the stock on the open market. Wholly intangible things or objects like copyrights, patents, and bank accounts are capable of being owned as property. But the list of things that can be property is not fixed, for our concept of property continues to evolve.

Classification of Property

Property can be classified in various ways, including real versus personal, tangible versus intangible, and private versus public. Perhaps the most important distinction is between real and personal property. Essentially, **real property** is immovable; **personal property** is movable. At common law, personal property has been referred to as "chattels." When chattels become affixed to real property in a certain manner, they are called fixtures and are treated as real property. (For example, a bathroom cabinet purchased at Home Depot and screwed into the bathroom wall may be converted to part of the real property when it is affixed). **Tangible property** is that which physically exists, like a popsicle stand, a hair dryer, or a steamroller. **Intangible property** is something without physical reality that entitles the owner to certain benefits; stocks, bonds, and intellectual property would be common examples. **Public property** is that which is owned by any branch of government, such as a courthouse or a public park. Public property can also include personal property, such as automobiles, furniture, and computers owned by state or local governments. **Private property** is that which is owned by anyone else. Individuals, corporations, and partnerships, for instance, can own private property. Private property can include real property like land or buildings, and personal property, such as automobiles, furniture, and computers.

Definition: Terms Relating to Classification of Property

Real property: Immovable property consisting of land, buildings permanently attached to land, fixtures, and trees or other plants intended to be permanently attached to land.

Fixture: Personal property that has become permanently attached to the land or to permanent buildings on the land.

Personal property: Moveable property that is not real property nor permanently affixed to real property. This would include crops intended to be harvested.

Tangible property: Personal property that is moveable, touchable, and has value in and of itself

Intangible property: Personal property that represents something valuable in terms of rights or benefits that are a part of it; it is not "touchable"

Public property: Any property owned by any branch of government

Private Property: Any property that is owned by any person or entity other than the government

Importance of the Distinction between Real and Personal Property

In our legal system, the distinction between real and personal property is significant in several ways. For example, the sale of personal property, but not real property, is governed by Article 2 of the Uniform Commercial Code (UCC). Real estate transactions, by contrast, are governed by the general law of contracts. Suppose goods are exchanged for real property. Section 2-304 of the UCC says that the transfer of the goods and the seller's obligations with reference to them are subject to Article 2, but not the transfer of the interests in real property nor the transferor's obligations in connection with them.

The form of transfer depends on whether the property is real or personal. Real property is normally transferred by a deed, which must meet formal requirements dictated by state law. By contrast, transfer of personal property often can take place without any documents at all.

Another difference can be found in the law that governs the transfer of property on death. A person's heirs depend on the law of the state for distribution of his property if the person dies intestate—that is, without a will. Who the heirs are and what their share of the property will be may depend on whether the property is real or personal. For example, surviving spouses may be entitled to a different percentage of real property than personal property when their spouses die intestate.

Real Property

Real property is land, and certain things that are attached to it or associated with it. Real property includes undeveloped land, like a forest or a field, and it includes buildings, such as houses, condominiums, and office buildings. Real property also includes things associated with the land, like subsurface rights. **Subsurface or mineral rights** are rights to the substances beneath the actual surface of the land. If you are interested in drilling for oil, but you do not want to buy every piece of land where you might wish to speculate, then you probably are in the market to purchase or lease mineral rights. This would allow you the right to extract whatever you find under the surface of the land and sell it. **Fixtures** are personal property that have become attached to the land, and they are transferred with the land. Fixtures in a house include things like the lights affixed to the ceiling, the furnace, and the bathtub. Plants and trees that grow on the land are real property until they are severed from the land. For example, farmers' crops are part of their real property until they are separated from the land, at which time they become personal property.

Personal Property

Personal property is property that is not real property. **Tangible property** is something that can be touched. Moveable, tangible personal property is also known as **chattel**. Some personal property is intangible. **Intangible property** does not physically exist, but it is still subject to ownership principles, including acquisition, transfer, and sale. For instance, the right to payment under a contract, the right to exclude others from a patented product, and the right to prohibit others from using copyrighted materials are all examples of intangible property.

Sounds simple, right? Your iPod, your flash drive, and your computer are all personal property. Your dorm room, apartment, or house is real property. So far, so good. But imagine that you found a Jacuzzi for sale that you loved. You plunked down $5,000 to buy it, and you have it delivered to your house. You pay for construction of a deck to surround it and plumbing to service it. Is the Jacuzzi personal property or is it real property? This is an example of personal property that becomes attached to the land as a **fixture**. A fixture is something that was once personal property, but it has become attached to the land so that it is legally a part of the land. Fixtures are treated like real property. Accordingly, when real property is transferred, fixtures are transferred as a part of the real property. In our example, if you move, you will have to leave your beloved Jacuzzi behind, unless you make express provisions to remove it. What if you were just renting? Since removing a fixture would cause substantial harm to the property, that fixture remains with the land. The landlord might be very happy about that!

Some things that are attached to the land are not fixtures but are part of the real property itself. Imagine a farm with one thousand acres planted in corn. Is the corn crop personal property, or is it real property? Or imagine a forest. Maybe the owner has been thinking about timbering the forest for some extra money. Is the forest personal property, or is it real property? Both the corn crop and trees are examples of real property that can become personal property, if they are severed from the land. This means that when an ear of corn is picked from the stalk, the ear of corn becomes personal property, even though, while it was growing and still attached to the land, it was real property. Likewise, when a tree is felled, that tree is transformed from real property to personal property.

Classifying the client's property is the first step toward understanding what the client owns and how an estate plan can protect and distribute it. Next, it's important to understand how property is owned, in the legal sense, and how that ownership impacts estate planning.

2.2: Basic Introduction to Property Ownership and Interests

Once property has been classified as real property or personal property, the next step is to classify the ownership or interest the person has in the property. Some types of ownership and interests in property can be transferred through intestacy or in a will or a trust, while others cannot. We will first look at the types of ownership and interests that apply to both personal property and real property. Then, we will look at some interests in property that are unique to real property.

Before diving into the details of property ownership and distribution, there is quite a bit of terminology with which you should become familiar:

Definition: Terms Relating to Property Ownership and Distribution

T**ransfer/Conveyance/Disposition/Grant:** property ownership or other interest in property is given, sold, or exchanged.

Grantor: the person giving, selling, or exchanging property ownership or interest

Grantee: the person receiving the property ownership

Ownership: full and complete power over property, with no restrictions on using it, giving it away, selling it, or exchanging it

Interest: a right to property that is less than full ownership because it is restricted in some way

Title: a document that identifies the person(s) owning the property or having an interest in the property, and that also describes any restrictions on ownership

Legal Title: the right to control and manage property, usually for another person's benefit

Equitable Title: the current right to benefit from property, and also a right to receive full ownership of property at some point in the future.

Deed/Warranty Deed/Quitclaim Deed: a document transferring title to real property

Vest: Full property ownership, possession, and title of property are delivered to the grantee

Divest: Full property ownership, possession, and title of property are removed from someone who previously was a full owner or owned an interest in the property

Single Party Ownership

Ownership in severalty, perhaps ironically, refers to ownership of property by a single person or entity. One way to think of it is that if I own property in severalty, it is owned by "me, myself, and I." Another way to look at it is that my ownership of the property has been severed (separated) from anyone else's potential ownership or interest in it. This understanding will become clearer when we discuss the partition (or severance) of property owned by multiple parties. If a person owns property in severalty, that person has complete and unrestricted power to transfer the property to others during life as a gift, sale, transfer, etc.

Definition: Severalty

Ownership in severalty: Ownership of property by a single person or entity.

After the person dies, the property is transferred to the person's heirs (through intestacy, if there is no will or trust) or can be given to the person's desired beneficiaries named in a will or trust. Unless the property is owned in a trust, a court process called **probate** is necessary to determine who receives the property. A decedent's property that is subject to estate administration by the personal representative is called **probate property.**

Definition: Probate Property

Probate property: Property owned in such a way that it can be transferred in a will, and that must go through the probate court process to determine who receives the property when the owner dies.

Multiple-Party Ownership

There are many ways in which property can be owned by two or more parties. The most common are Joint Tenancy, Tenancy in Common, and Community/Marital Property. While there are some similar characteristics between these types of multiple-party ownership, there are also important differences. These differences primarily impact the ability of a party to transfer property ownership after the party's death.

Joint Tenancy

Joint Tenancy is a specialized form of multiple-party property ownership that only exists if certain conditions are met. The reason is that ownership in joint tenancy restricts an owner's ability to transfer the property, particularly after death; as a result, it is important to ensure that this type of ownership is what was intended. A joint tenancy is typically created in a deed (as in the case of real property), a title document (as in the case of personal property such as a car or bank account), or in a will or trust. The required conditions for creating a joint tenancy are sometimes referred to as the "**four unities**" (in other words, things that must be the same for all owners):

1. **Possession**: each owner has a right to possess, use, enjoy the whole property at any time during ownership. The property is not divided physically among the owners, nor is it divided according to time periods.
2. **Interest**: each owner has an equal share of ownership "interest" or percentage of ownership "rights" in the property. This relates to the ability to receive proceeds from the sale of the property, among other things. So, if there are four (4) joint tenants, each has a 25% interest in the property. If the entire property is sold for $100,000, each joint tenant would receive $25,000.
3. **Time**: all owners receive their right to possess the property at the same time. This means there had to be a single transaction that created all of the owners' rights, and all of those rights were effective on the same date and time.
4. **Title**: all owners receive their right to possess the property from the same source or transferring instrument/document – a single deed or title document, or a single will or trust. Additionally, the transferring instrument/document is required to use the words "as joint tenants" or "jointly."

When a joint tenancy is created, transfer of the property after death is restricted by the joint tenants' **right of survivorship**. This means that when a joint tenant dies, that joint tenant's interest passes to the surviving joint tenants automatically (or **by operation of law**). Property having a right of survivorship is **non-probate property.**

Definition: Terms Relating to Joint Tenancy

Joint Tenancy: A form of multiple party ownership between 2 or more parties with each having equal interests that were obtained at the same time from the same person pursuant to a single document/transaction. Joint tenancy includes a right of survivorship.

Right of Survivorship: An interest in property passes to the surviving joint tenants automatically (or **by operation of law**). Property having a right of survivorship is non-probate property**.**

Non-probate property: Property owned in such a way that it *cannot* be transferred in a will, and does not go through the probate court process to determine who receives the property when the owner dies.

No transferring instrument/document is required, and any attempt to transfer the property to someone else in a will or a trust is not enforceable. So, if there are 4 joint tenants and one of them dies, the surviving three (3) joint tenants each now automatically own a 1/3 interest in the property. If another joint tenant later dies, the surviving 2 joint tenants each will automatically own a 50% interest in the property. If one more joint tenant dies, the last surviving joint tenant will then automatically own the entire property in severalty. The last surviving joint tenant is the only one of the original 4 joint tenants who can transfer the property in a will or a trust.

Example

Deed:	Result	Event	Result	Event	Result	Event	Result

Deed:		Result	Event	Result	Event	Result	Event	Result
"To Alfa, Bravo, Charlie, and Delta **as joint tenants**"	→	Alfa: 25% Bravo: 25% Charlie: 25% Delta: 25% **joint tenants**	Alfa Dies	Bravo: 1/3 Charlie: 1/3 Delta: 1/3 **joint tenants**	Bravo Dies	Charlie: 50% Delta: 50% **joint tenants**	Charlie Dies	Delta: 100% **in severalty**

The right of survivorship only controls when a joint tenant has died. During their lifetimes, joint tenants are allowed to transfer their interest in the property to someone else – but only their interest. This is known as **severance**.

Definition: Severance

Severance: A transfer by a joint tenant of their interest in jointly owned property to someone else during their lifetime.

Echo is not a joint tenant because Echo does not share the unities of time and title with Bravo, Charlie, and Delta. This also means that if Echo later dies, Charlie and Delta do That transfer has no impact on the remaining joint tenants, except that they now share possession with someone new. Here is how this works: Suppose a piece of real property is owned by 4 joint tenants, Alfa, Bravo, Charlie, and Delta. Alfa decides to sell their 25% interest in the property to Echo. Bravo, Charlie, and Delta still each own a 25% interest in the property as joint tenants, with the right of survivorship between them. That means that when Bravo dies, Charlie and Delta will each automatically own 37.5% of the property as joint tenants (they each receive an equal share of Bravo's 25% interest when Bravo dies). Echo receives nothing when Bravo dies because Echo is not a joint tenant.not receive Echo's 25% interest; Echo's interest passes according to Echo's will or trust, or to Echo's heirs if there is no will or trust. That is because the right of survivorship with respect to Alfa's 25% interest in the property was severed when Alfa sold it to Echo (**see Example 1, below**). Similarly, if Echo survives but Charlie dies, Delta now owns a 75% interest in the property (received from Bravo and Charlie); Echo still owns only the 25% interest Alfie sold to Echo. Not only that, but Delta and Echo are not joint tenants. Instead, they are tenants in common (**see Example 2, below**).

Example 1

Deed:		Result	Event	Result	Event	Result	Event	Result
"To Alfa, Bravo, Charlie, and Delta as **joint tenants**"	→	Alfa: 25% Bravo: 25% Charlie: 25% Delta: 25% **joint tenants**	Alfa sells to Echo	Bravo: 25% Charlie: 25% Delta: 25% **joint tenants** Echo: 25% **Tenant in common**	Bravo Dies	Charlie: 37.5% Delta: 37.5% **joint tenants** Echo: 25% **Tenant in common**	Echo Dies	Charlie: 37.5% Delta: 37.5% **joint tenants** Echo's heirs: 25% **Tenant in common**

Example 2

Deed:		Result	Event	Result	Event	Result	Event	Result
“To Alfa, Bravo, Charlie, and Delta as **joint tenants**”	→	Alfa: 25% Bravo: 25% Charlie: 25% Delta: 25% **joint tenants**	Alfa sells to Echo	Bravo: 25% Charlie: 25% Delta: 25% **joint tenants** Echo: 25% **Tenant in common**	Bravo Dies	Charlie: 37.5% Delta: 37.5% **joint tenants** Echo: 25% **Tenant in common**	Charlie Dies	Delta: 75% **Tenant in common** Echo: 25% **Tenant in common**

Severance issues arise in many situations in addition to transfers of title, such as contracts to transfer title, leases, mortgages, involuntary transfers, and even transfers not involving third parties.

Tenancy in Common

Tenancy in Common is the simplest form of multiple-party property ownership and is the “default” type of multiple-party ownership. That means that if multiple parties own property, it is presumed that they are Tenants in Common unless all of the requirements of one of the other types of multiple-party ownership (that is, Joint Tenancy or Community/Marital Property) are met. Thus, it is also the most common type of multiple-party ownership. A tenancy in common is typically created in a deed (as in the case of real property), title document (as in the case of personal property), or in a will or trust that simply lists multiple persons as owners (or beneficiaries) of the property.

Definition: Term

Tenancy in Common: A form of multiple party ownership between 2 or more parties. Their interests *do not need* to be equal, created at the same time, received from the same person, nor pursuant to a single document/transaction. Tenancy in Common does not include a right of survivorship; instead it is **probate property.**

Unlike a joint tenancy, tenancy in common has only one “unity:” the unity of possession. That means tenants in common can have different amounts of “interest” and can receive their interests at different times and/or from different titles/sources. Another big difference is that tenancy in common has no right of survivorship. This means that, unlike joint tenancy, a tenant in common’s interest in the property can pass to the tenant in common’s heirs or transferred to someone else in a will or a trust. There is no automatic transfer of a tenant in common’s interest to anyone else. Because tenancy in common does not have a right of survivorship, it is probate property.

The only way a tenant in common’s interest in property increases is if one of the other tenants in common transfers their interest to a co-tenant in common. Suppose India, Juliet, and Kilo own property as tenants in common. If Juliet sells her interest to India, India’s interest in the property will increase. If Kilo later dies, Kilo’s share goes to Kilo’s heirs or to Kilo’s beneficiaries if Kilo had a will or a trust (**see Example 3, below**).

Example 3

Deed:		Result	Event	Result	Event	Result
“To India: 40% Juliet: 35% Kilo: 25%"	→	India: 40% Juliet: 35% Kilo: 25% **Tenants in common**	Juliet sells to India	India: 75% Kilo: 25% **Tenants in common**	Kilo Dies	India: 75% Kilo’s heirs: 25% **Tenants in common**

You may have noticed that a severance of a joint tenancy through an action of a joint tenant during that person's lifetime results in the creation of a tenant in common, who then enjoys equal possession of the property with the remaining joint tenants. With tenancy in common, there is no "severance" because the tenancy in common continues unaffected.

What if, in the examples above, a joint tenant or a tenant in common wanted to completely end the "ownership relationship" with the others? Of course, that person could purchase the other person's/persons' share(s) and own the entire property in severalty. If that's not feasible for whatever reason, if the property involved is real property the person wanting out of the joint tenancy or tenancy in common could petition the court for **partition**. A partition divides the real property into separate portions or parcels; each person then owns their portion/parcel of real property in severalty. Here's how that would look:

Definition: Partition

Partition. A court action requesting that real property owned in joint tenancy or tenancy in common be divided into separate portions or parcels; each person then owns their portion/parcel of real property in severalty.

Example 4

Before partition

Alfa:	25%
Bravo:	25%
Charlie:	25%
Delta:	25%

Joint Tenants

After partition

Alfa:	25%
Bravo:	25%
Charlie:	25%
Delta:	25%

The parcel of land is divided into 4 equal portions. Each person now owns one portion in severalty.

Example 5

Before partition

India:	40%
Juliet:	35%
Kilo:	25%

Tenants in common

After partition

India:	40%
Juliet:	35%
Kilo:	25%

The parcel of land is divided into 3 unequal portions, according to each person's amount of interest. Each person now owns one portion in severalty.

The partition results in each person owning a specific piece of the land that is now divided in severalty; there is no longer a "unity of possession" for the entire parcel. Because partition creates property ownership in severalty, each parcel is probate property.

Tenancy by the Entirety

Tenancy by the entirety is similar to joint tenancy, except that it is restricted to spouses. It requires the "4 unities" of joint tenancy plus one more – the unity of person (as in, the 2 spouses are 1 "person" – a largely antiquated point of view). This form of ownership is very restrictive, in that one spouse cannot transfer or encumber the property in any way – during a lifetime or by will or trust – without the written and signed consent of the other spouse. As a result, only about half of the US States allow tenancy by the entirety. Wisconsin is not one of them.

If the couple terminates their marriage through divorce, they become tenants in common of any property they own in tenancy by the entirety. However, a legal separation does not impact tenancy by the entirety in most states that recognize this form of ownership, because legal separation does not terminate the marriage.

Community/Marital Property

Community/marital property is a classification of property owned by spouses during their marriage that is recognized by 10 States, including Wisconsin. It is far less restrictive in terms of the spouses' ability to transfer property during their lifetimes and by will or trust. Community/Marital property laws are based on the principle that both spouses contribute toward the accumulation of property and should therefore each own an undivided half interest in all property acquired during the marriage, regardless of each individual's financial contribution.

Community/marital property is defined as **all income or property that is earned or acquired during the marriage *except for***

- Property excluded from the community/marital property laws through the parties' written agreement
- Gifts, inheritances received by only one spouse through intestacy, will, or trust
- Items owned by only one spouse prior to the marriage

Those items, along with items already owned by one spouse prior to the marriage, remain the **separate or individual property** of that spouse (although separate/individual property can lose its status if it is commingled with community/marital property).

Definition: Terms Relating to Property Owned by Spouses

Community/marital property: All income or property that is earned or acquired during the marriage, unless it qualifies as separate or individual property

Separate or individual property: Property received by one spouse as a gift or inheritance, property owned by one of the spouses prior to the marriage, or property excluded from he community/marital property laws through the parties' written agreement

Commingled property: Property that was once separate/individual property that has been mixed or combined with community/marital property.

Survivorship Marital Property: A type of Marital Property ownership allowed in Wisconsin that has a right of survivorship.

Generally, when it comes to transactions relating to the property (both during life and in a will or trust), each spouse has complete and exclusive control over that spouse's 50% interest in the property – but not over the other spouse's 50%. This means that, in the context of estate planning, a spouse can only effectively transfer that spouse's 50% interest in a will or a trust; the surviving spouse is entitled to retain the other 50%. Determining who receives community/marital property if a spouse dies intestate varies among the states; this topic will be discussed in later chapters. Similarly, the impact of divorce or legal separation on the division of community/marital property also varies among states.

In most states, community/marital property does not include a right of survivorship. However, Wisconsin, Nevada, California, Arizona, and Alaska allow the parties to designate property as having a right of survivorship. In Wisconsin, this is done on the title document by stating that the spouses own the property as **Survivorship Marital Property**. Survivorship Marital Property is similar to joint tenancy, in that upon the death of one spouse, ownership automatically transfers to the other spouse by operation of law. In addition, the designation is accompanied by some tax advantages to the surviving spouse that are not present in joint tenancy.

Another tricky issue arises when spouses move between community/marital property states and other states (often referred to as common law states). Whether some or all of their property is community/marital property depends on where the spouses are domiciled on their date of death. Remember, **domicile** is the place where a person intends to make their legal, permanent home (how domicile is determined is discussed in a later chapter). When spouses move to a community/marital property state, all of their property that is not separate/individual property under the law of that state is presumed to be community/marital property, even if it was acquired while the spouses lived in a common law state. However, the reverse is not true if the spouses move from a community/marital property state to a common law state. Any property these spouses acquired as community/marital property remains community/marital property; any property acquired after they move will most likely be considered separate/individual property. Therefore, estate planning practitioners located in common law states must make a detailed inquiry regarding where the spouses lived when each item of property was acquired.

Below is a table comparing the types of multiple-party property interest ownership forms.

Mulitple-Party Property Interest Ownership Forms

Ownership	Advantages	Disadvantages	Formation	Probate or non-probate	States recognizing
Joint Tenancy	Avoids probate; immediate transfer upon death	Lack of control over property Lack of control over other owners and/or who receives ownership in the future (severance) May be subject to claims by co-owners' creditors	Two or more owners "as joint tenants" in deed, title document, will or trust	Non-probate; right of survivorship	All states except LA; AK for personal property only; some states have slightly different names
Tenancy in Common	Easy to create Can create varying amounts of interest Interest can be given to others in a will or trust	Lack of control over property Lack of control over other owners and/or who receives ownership in the future Probate property that may be subject to co-owners' creditors' claims	Two or more owners listed in deed, title document, will or trust with no other designation	Probate; no right of survivorship	All states
Tenancy by the Entirety	Avoids probate Subject only to claims by creditors of both spouses	Both spouses must agree in writing to any transfer during life or in a will or trust	Only to spouses; designated as "tenancy by the entirety"	Non-probate; right of survivorship	AR, DE, FL, KY, MD, MA, MI, MO, MT, OK, PA, TN, VT, VA, WY AK, IL, IN, MS, NJ, NY, NC, OR for real property only
Community/ Marital property	Recognizes non-financial contributions of both spouses	Probate property; tricky succession for intestate spouses or spouses who move to a common law state	Created between spouses by operation of law	Probate; no right of survivorship	AK, AZ, CA, ID, LA, NV, NM, TX, WA, WI
Survivorship Community/ Marital Property	Avoids probate; tax advantages regarding valuation for capital gains tax	Lifetime modification restricted	Only to spouses; designated as "survivorship" marital or community property	Non-probate; right of survivorship	AK, AZ, CA, NV, WI

These types of ownership interests are available for both personal property and real property, in most states. The next chapter will discuss ownership interests available only for real property.

2.3: Basic Introduction to Estates in Real Property

Usually, when we talk about property rights, we talk about "ownership." Technically, though, in the Anglo-American legal system, real property is not "owned" directly. Rather, people own legal interests in real property called "**estates in real property**," which is an interest in land measured by some period of time and refers to the degree, quantity, nature, and extent of interest a person has in real property. Estates in real property are categorized as either freehold or non-freehold, and there are different types of interests under each category. In this chapter, we will discuss fee simple estates, life estates, and leasehold estates.

> **Definition: Terms Relating to Estates in Real Property**
>
> **Estates in real property:** A legal interest in land measured by some period of time and refers to the degree, quantity, nature, and extent of interest a person has in real property.
>
> **Freehold estate:** An interest in real property held by only one person/entity and can be held for an *indefinite* period of time (not specifically defined in terms of years or months).
>
> **Non-freehold estate:** An interest in real property that provides exclusive possession of real property held for a *definite* period of time (usually defined in terms of years or months).

Freehold Estates

Freehold estates involve interests that are held by only one person/entity and can be held for an indefinite (or not specifically defined in terms of years or months) period of time. Thus, real property owned in joint tenancy, tenancy in common, or as marital/community property is not a freehold estate, because more than one person owns an interest. The two most common types of freehold estates are fee simple and life estates.

Fee simple/fee simple absolute is an interest that is complete and unrestricted as to time or control. This interest is owned until the owner dies and can be transferred at death to the owner's beneficiaries or heirs (making this type of interest a type of **probate property**). During life, the owner has absolute dominion and control over the possession, use, and transfer of the real property. Because it is the least restrictive type of ownership, if a deed or other document transfers real property to only one person as the owner, with no restrictive words, a fee simple absolute is presumed. Frequently, a person desiring to transfer a fee simple absolute in a will or trust will add the words, "and his/her heirs" to the document.

> **Definition: Fee Simple Absolulte**
>
> **Fee simple/fee simple absolute:** An interest in real property that is complete and unrestricted as to time or control.

Each of the following examples would create a fee simple:

- Deed: To Lima
- Contract: To Mike in fee simple
- Will: To Nancy in fee simple absolute
- Trust: To Oscar and his heirs

Sometimes, a person desires to maintain some control over the new owner of a real property interest by placing conditions on the continuation of the interest. For example, a person might create a fee simple that will automatically end if a certain circumstance occurs or a condition is violated. An example would be a deed that transfers real property to Poppy in fee simple as long as Poppy maintains complete sobriety. If the condition is violated, Poppy's interest terminates. This is called a **fee simple defeasible.** Because the ownership has the potential to continue indefinitely (as long as the condition does not occur), it is still considered a freehold estate.

> **Definition: Fee Simple Defeasible**
>
> **Fee simple defeasible:** a fee simple interest that will automatically end if a certain circumstance occurs or a condition is violated. If the circumstance does not occur (or the condition is not violated), the interest continues indefinitely.

Life estate is an interest that lasts as long as a specified person's life. The person who owns the life estate is known as the **life tenant**. There are 3 choices with respect to whose life determines how long the life estate will last: (1) the grantee's life; (2) the grantor's life; (3) the life of a third party who is neither the grantee nor the grantor of the life estate. When a life estate lasts for a life other than that of the grantee, it is called an estate *pur autre vie* (this is a French phrase that means, "for another's life").

Definition: Life Estate

Life estate: An interest in real property that lasts as long as a specified person's life. When the specified life ends, the interest automatically terminates.

Life tenant: The person who owns the life estate.

Even though life estates are freehold estates, there are significant differences between a life estate and a fee simple, as shown below:

	Fee Simple Absolute	Life Estate
Duration	Unrestricted, indefinite, permanent	Tied to a specific person's life
Ownership interest during life	Complete, absolute dominion and control over the possession, use, and transfer of the real property during life	Complete, absolute dominion and control over *only* the possession and use of the real property Cannot transfer the real property during life
What happens to ownership interest upon death?	Goes to the grantee's heirs, or beneficiaries named in the grantee's will or trust	Does not go to the grantee's heirs; cannot be transferred to beneficiaries in the grantee's will or trust

As you can see, a life estate restricts the grantee's ability to transfer the real property. Due to this restriction, the transferring deed/instrument/document is required to use words that explicitly show the intent to create a life estate, such as "for life" or "for the life of [xx]" or "as a life tenant."

Because a life estate terminates at some point, every life estate is followed by a future interest. The future interest can be any type of interest in real property, and there can be multiple future interests created in the same document. There are two possibilities here: a **reversionary interest** or a **remainder interest**.

A reversion/reversionary interest is a future interest retained by (or that goes back to) the original grantor. This interest is created if there are no other future interests granted after the life estate terminates; or, if there are other future interests granted, the last one in line is not a fee simple. In other words, if the grantor never gives anyone a future fee simple, then the real property goes back to the grantor (or to the grantor's estate, if the grantor has died).

A remainder/remainderman is a future interest to someone other than the original grantor that takes effect immediately after a life estate is terminated and that is created by the same deed/instrument/document that created the life estate. The remainderman is a person who ultimately ends up with a fee simple after any other interests have terminated. A remainder interest exists when the deed or document transfers ownership of the real property "to [someone else] in fee simple" or "to [someone else] and his/her heirs" or without any restrictions – simply, "to [someone else]."

Definition: Reversionary Interest

A Reversion/reversionary interest: A future interest retained by (or that goes back to) the original grantor when the life estate terminates.

Definition: Remainder interest

Remainder/remainderman: a future interest to someone other than the original grantor that takes effect immediately after the life estate terminates. It is created by the same deed/instrument/document that created the life estate.

The examples below show the differences between a life estate with a reversionary interest and a life estate with a remainder interest:

Reversionary Interest

Grantor, Quentin, Deeds:	Result	Event	Result	Event	Result
“To Romeo for life, then to Sier	Romeo has an immediate life est	Romeo dies	Sierra has an immediate life estate.	Sierra dies	Property reverts back to Quentin

ra for life.”	ate. Sierra has a future life estate.				

Remainder Interest

Grantor, Quentin, Deeds:	Result	Event	Result	Event	Result
“To Romeo for life, then to Sierra fo	Romeo has an immediate life estate.	Romeo dies	Sierra has an immediate life estate. Thomas has a future fee simple.	Sierra dies	Property goes to Thomas (and his heirs) in fee simple.

r life, then to Thomas.”	Sierra has a future life estate. Thomas has a future fee simpl				

e .				

Non-Freehold Estates

Non-freehold estates involve interests that provide exclusive possession of real property but are held for a definite (usually defined in terms of years or months) period of time and with restrictions on use and transfer. The most common type of non-freehold estate is a **leasehold estate**, in which tenants occupy the property for a specific period of time but do not own it. Most of us are familiar with leaseholds in the context of a landlord who owns real property and rents it to a tenant.

Definition: Leasehold estate

Leasehold estate: An interest in real property in which tenants occupy the property for a specific period of time but do not own it.

Leasehold estates include tenancies at will (created with the landlord's consent but with no written lease), tenancy at sufferance (tenant remains in the property after the lease expires but without the landlord's consent), periodic tenancies (month-to-month or year-to-year, created by written agreement) and a tenancy for years. This textbook will examine only the last type, a **tenancy for years**.

Definition: Tenancy for years

Tenancy/estate for years: A leasehold interest in real property specifies that the interest will last for a specific period of time (defined in terms of years).

A tenancy/estate for years is a leasehold interest in real property specifies that the interest will last for a specific period of time. Once the period of time has passed, the tenancy terminates automatically; no notice to terminate or other action is required.

Similar to a life estate, a tenancy for years restricts the grantee's ability to transfer the real property. Due to this restriction, the transferring deed/instrument/document is required to use words that explicitly show the intent to create a tenancy for a specified number of years, such as "for 20 years."

Also similar to a life estate, a tenancy for years terminates at the end of the specified time period; thus, every tenancy for years is followed by a future interest. The future interest can be any type of interest in real property, and there can be multiple future interests created in the same document. Like a life estate, a tenancy for years is followed by either a reversionary interest or a remainder interest.

The examples below show the differences between a tenancy for years with a reversionary interest and a tenancy for years with a remainder interest:

Reversionary Interest

Grantor, Ursula, Deeds:	Result	Event	Result	20 years later...
"To Victor for life, then to Wanda for 20 years."	Victor has an immediate life estate. Wanda has a future tenancy for 20 years.	Victor dies	Wanda has an immediate tenancy for 20 years.	Property reverts back to Ursula

Remainder Interest

Grantor, Ursula, Deeds:	Result	Event	Result	20 years later...

Grantor, Ursula, Deeds:	Result	Event	Result	20 years later...
“To Victor for life, then to Wanda for 20 years, then to Xerxes.”	Victor has an immediate life estate. Wanda has a future tenancy for 20 years. Xerxes has a future fee simple.	Victor dies	Wanda has an immediate tenancy for 20 years. Xerxes has a future fee simple.	Property goes to Xerxes (and his heirs) in fee simple.

Below is a table comparing the types of estates in real property

Ownership	Freehold or non-freehold	Formation	Probate or non-probate
Fee simple	Freehold	One owner in deed, will, or trust • “to [name]” • “to [name] and his/her heirs • “to [name] forever	Probate
Life estate	Freehold	One owner in deed, will, or trust • “to [name] for life” • “to [name] for the life of [other name]	Non-probate Has either a reversion or a remainder interest
Tenancy for years	Non-freehold	One owner in deed, will, or trust • “to [name] for [specified number] years”	Non-probate Has either a reversion or a remainder interest

Spouses' Rights Relating to Real Property in Common Law States

As you learned previously, some states provide community/marital property rights to spouses with respect to both real and personal property acquired during the marriage. But what about the remaining states that do not have community/marital property laws? These states are typically referred to as common law states, and they do provide some special rights to surviving spouses, called **dower** and **curtesy**.

Definition: Terms

Dower: A wife's right to received a life estate in 1/3 of her deceased husband’s real property owned during the marriage.

Curtesy. A husband's right to receive a life estate in all of his deceased wife’s real property owned during the marriage, but only if a child was born alive during the marriage.

Under the old common law, a wife received a life estate in 1/3 of her deceased husband’s real property owned during the marriage. The purpose of **dower** was to protect her from disinheritance and provide a means of support after her husband’s death. In contrast, a husband's **curtesy** provided him with a life estate in all of his deceased wife’s real property owned during the marriage, but only if a child was born alive during the marriage. Interestingly, the husband could not transfer his wife’s estate to anyone other than their children. Only 3 states still follow some form of dower and curtesy: Arkansas, Kentucky, and Ohio (the main difference is that these states provide the same interests in land to both spouses). The remaining common law states have laws prioritizing the surviving spouse and/or children if a spouse dies intestate, as well as providing for a statutory “forced” or “elective” share for a surviving spouse when the deceased spouse dies with a will. These concepts are discussed more fully in a later chapter.

Paralegal Roles

Whether a client comes to the law office requesting an estate plan or assistance with a probate matter, the paralegal’s role is to support the supervising attorney in obtaining information about the type of property owned by the client/deceased person, where that property is located, how that property is owned, and the value of the property. This involves client interviews, obtaining copies of deeds, titles, and other ownership documents, as well as public records searches.

CHAPTER OVERVIEW

3: Succession

3.1: Basic Introduction to Intestate Succession

Most people own at least some property when they die; however, not everyone dies with a will or a trust that directs how all their property is to be distributed when they die. A person who dies without a valid will, trust, or other instrument distributing a decedent's property has died **intestate.** Each State has its own statutes that dictate who receives property that is not disposed of in a will, trust, or other testamentary/survivorship document, outline probate procedures for intestate decedents, identify the decedent’s heirs and their rights, and guardianship for minor children and incompetent heirs. These statutes vary from state to state and legal practitioners must check the details in whichever state the decedent dies or owns real property. This chapter will discuss basic terminology related to intestacy and introduce some concepts applicable in most states.

Before diving into the details of intestacy, there is quite a bit of terminology with which you should become familiar:

efinition: Terms Relating to Intestacy

Intestate: to die without a valid will, trust, or other instrument distributing the decedent's property.

Decedent: the person who has passed away.

Kindred: all persons who are related to the decedent by blood or adoption.

Ascendant/ancestor/lineal ascendant: a decedent’s parents, grandparents, great-grandparents, etc., who are related to the decedent by blood or adoption.

Descendant/lineal descendant: a decedent’s children, grandchildren, great-grandchildren, etc., who are related to the decedent by blood or adoption.

Issue: all persons who have descended from a common ancestor.

Collateral relatives: a decedent’s siblings, aunts, uncles, nephews, nieces, cousins, etc., who are related to the decedent by blood or adoption. They share a common ancestor with the decedent.

Half-blood: the relationship that exists between persons who have the same mother or the same father in common, but not both parents.

Consanguinity: persons who are related by blood through a common ancestor.

Affinity: persons who are related by marriage (in-laws, steps, spouses of the decedent’s kindred).

Heirs: persons who are entitled to receive a decedent’s property under intestacy statutes. These include kindred, and also the decedent’s surviving spouse.

Escheat: the passage of an intestate decedent’s property to the State in which the decedent was domiciled at death (for personal property) or to the State in which the property is located (for real property), when the decedent has no surviving heirs.

Additional terminology will be introduced in the context of this chapter and upcoming chapters.

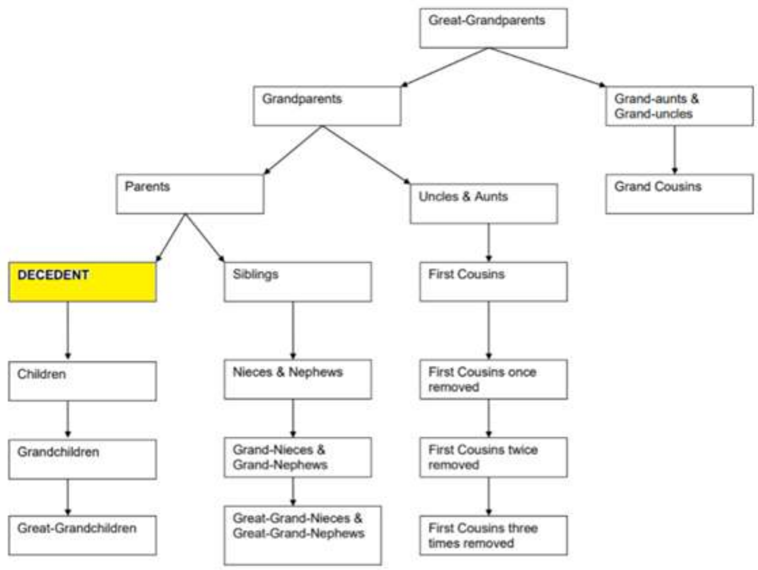
Intestate Succession

Under common law, a spouse was not an heir (with the exception of dower and curtesy, discussed in Chapter 2.3). Pursuant to most intestate succession statutes, surviving spouses are considered heirs and typically have priority in receiving the decedent’s property. How much of a decedent’s estate a surviving spouse receives usually depends upon who else survives. If there are no surviving issue or parents of the decedent, the surviving spouse may take 100%. Where there are surviving issue of the decedent, the spouse and the surviving issue may divide the estate between them. In Wisconsin, how the surviving spouse and issue divide the decedent’s estate differs depending on whether the issue are also children of the surviving spouse.

If there is no surviving spouse and no issue, the decedent’s other surviving blood relatives receive shares of the decedent’s estate. For many states, the order or priority is parents, siblings, grandparents, and then other collateral relatives. For links to the intestate succession laws for all 50 states and the District of Columbia, see, https://www.findlaw.com/estate/planning-an-estate/intestate-succession-laws-by-state.html. If there are no surviving heirs, an intestate decedent’s property passes **(escheats)** to the State in which the decedent was domiciled at death (for personal property) or to the State in which the property is located (for real property). Remember, **domicile** is the place where a person intends to make their legal, permanent home (how domicile is determined is discussed in a later chapter).

The Family Tree

An important first step toward applying the laws of intestate succession is to have an understanding of the decedent's family tree. Increased access to ancestry records on the Internet has given many people the ability to trace their lineage for seven generations or more. In the context of probate and estate planning, however, it is usually enough to start with the decedent's great-grandparents. Below is an example of a family tree.



There are a few things to notice about this family tree:

- Only blood relatives are included; persons related solely by affinity are not included. This means that collateral relatives on the family tree such as uncles and aunts are the decedent's parents' siblings, and not their spouses (in other words, not the decedent's mother's sister's husband).
- In most states, half-blood relatives and adopted relatives are treated the same as full-blood relatives;
- Step-siblings, stepchildren, stepparents (etc.) also are not included on the family tree.

Intestate Succession – Some Basic Rules

After you have determined the identity of everyone on the decedent's family tree, you can begin to determine who will receive the decedent's property. There are some important basic rules to follow:

1. The decedent's surviving spouse is the only person related by affinity who will receive a share of the decedent's estate. Usually, the surviving spouse will receive the entire estate.
2. Any relative who has at least one surviving parent related to the decedent by blood does not receive a share of the decedent's estate. The only exception to this rule is if the decedent had children with someone other than the person to whom the decedent was married on the decedent's date of death.
3. Once a bloodline completely dies out, that bloodline is ignored when calculating how the surviving bloodlines will share the decedent's estate.

Intestate Succession – Dividing the Estate

How the above rules are applied to divide the decedent's estate among the surviving blood relatives varies among the states. Before getting into the details of how the estate is divided, more terminology is needed:

Definition: Terms Relating to Intestate Succession

Per capita: "equal to each person" or "by the heads." Distributing an estate equally to all surviving persons having the same degree of relationship to the decedent.

Right of representation: the right of a child/children to receive the deceased parent's share of the decedent's estate.

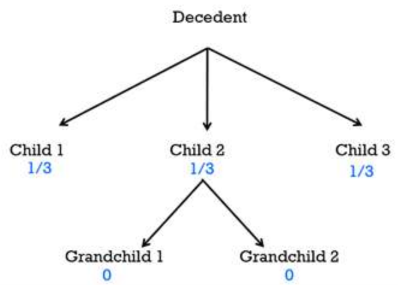
Per stirpes: a distribution of property that includes distribution to heirs of differing generations, based on the right of representation.

Degree of relationship: how closely related a person is to the decedent.

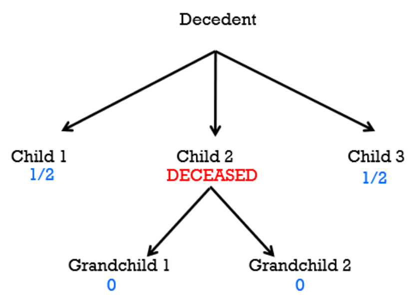
There are several different methods that states use to distribute intestate property, some of which may be a combination of per capita and per stirpes. Let's take a closer look.

"Straight" or "Strict" Per Capita

"Straight per capita" always applies when all of the same-generation ascendants or descendants survived the decedent. Suppose an unmarried/widowed decedent had three children, all of whom were living when the decedent died. One of those children has two children (the decedent's grandchildren). Under "straight per capita" (and the "basic rules" described above) only the decedent's three children would receive shares of the decedent's property, and each would receive 1/3 (one-third). The decedent's two grandchildren would receive nothing since they have a living parent related by blood to the decedent.

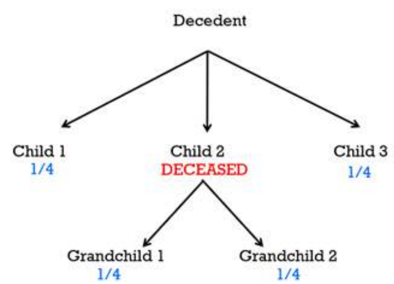


Now, suppose instead that Child 2 died before (or **predeceased**) the decedent. Under "straight per capita" Child 1 and Child 2 would each receive ½ (or 50%) of the decedent's property because they are the surviving children. The grandchildren would be left out. Most states do not use "straight per capita" when there are surviving issue of a predeceased heir at the same level as one or more surviving heirs.



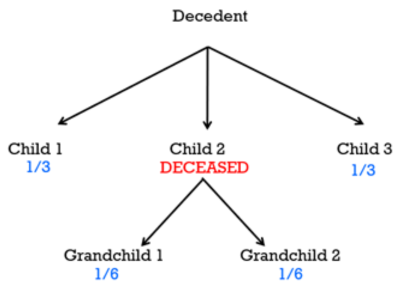
Per Capita by Representation

In this scenario, unlike in the above scenario, if Child 2 predeceased the decedent, the decedent's grandchildren would receive shares of the decedent's estate. Essentially, the grandchildren would "move up" a generation to represent their deceased parent and share equally with Child 1 and Child 3 in the decedent's estate; each "head" would receive ¼ (or 25%).

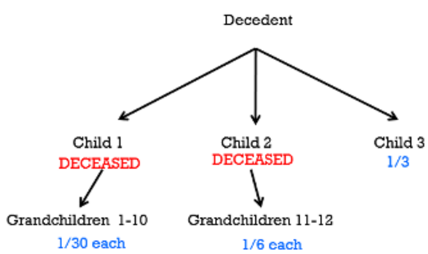


“Straight” or “Strict” Per Stirpes

The scenario above would look quite different under “straight” per stirpes. Instead of each grandchild becoming “a head” the two grandchildren would split the share their parent, Child 2, would have received as “a head” if Child 2 had survived. As you saw in “straight per capita” if Child 2 had survived, the decedent’s estate would have been divided into three shares, one for each child. Under "straight" per stirpes, the decedent’s estate is still divided into three shares, one for each child; the deceased child’s children split their parent’s share.

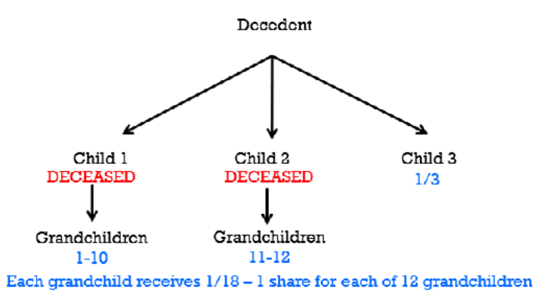


Imagine if Child 1 had also predeceased the decedent and had 10 children. Those 10 children would split the 1/3 share of child 1, so each would receive 1/30. Those grandchildren would receive a far smaller share than the other two grandchildren, who each receive 1/6. That doesn’t seem fair, does it? It doesn’t seem as though the decedent would want his/her grandchildren to be treated differently based on the number of siblings they have.



Per Capita at Each Generation

The Uniform Probate Code (UPC) attempts to address the unfairness described above. Under the UPC, a multi-step process is used that applies “straight” per capita at each generation. So, supposing only Child 3 survived the decedent, while Child 1 and Child 2 both predeceased. The decedent’s estate would be divided into 3 shares and Child 3 would receive 1/3 of the decedent’s estate. The remaining 2/3 of the decedent’s estate would be divided equally among all 12 of the surviving grandchildren. That means each grandchild would receive 1/18 of the decedent’s estate.



Regardless of whether the state uses per capita, per stirpes, or some combination of the two, most states and the Uniform Probate Code follow this pattern of succession:

- First to the surviving spouse and children; if none, then to
- Other surviving lineal descendants (grandchildren, great-grandchildren, etc.); if none, then to
- Surviving lineal ascendants (parents, grandparents, etc.); if none, then to
- Surviving collateral relatives who are descendants of the decedent’s parents (siblings, nieces, nephews, grandnieces, grandnephews); if none, then to
- Surviving collateral relatives such as aunts, uncles, and cousins according to their degree of relationship; if none, then to

- The State by escheat

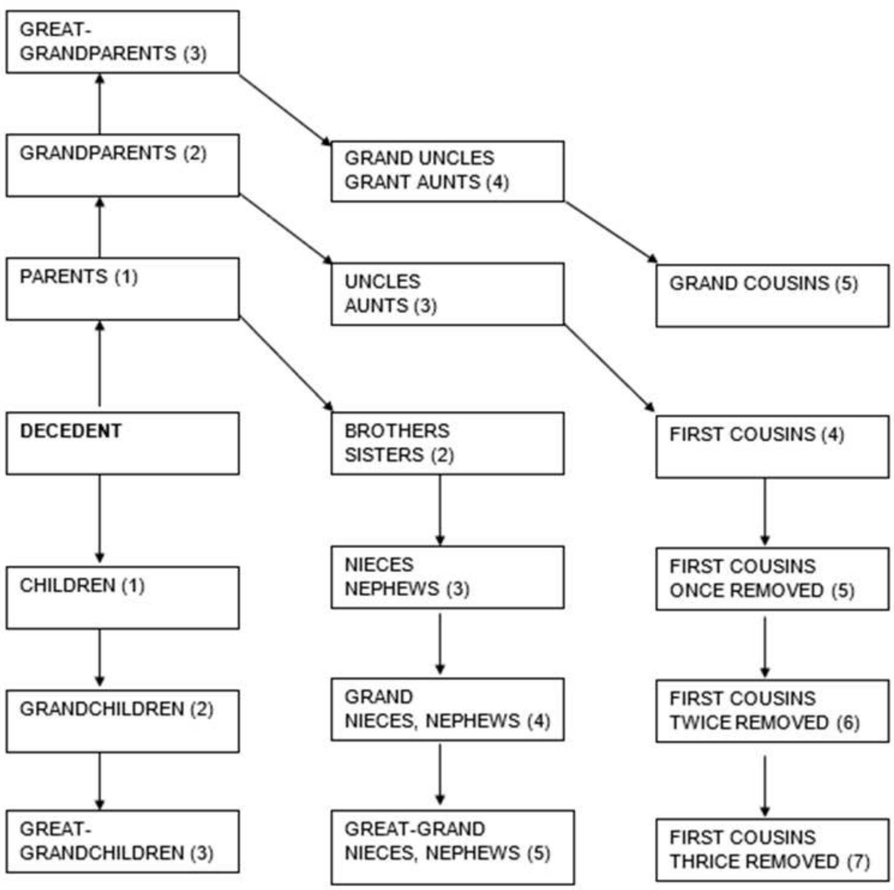
Degree of Relationship

Sometimes the decedent has no surviving lineal ascendants or descendants. In that case, the decedent's estate goes to collateral relatives, based on their degree of relationship to the decedent. The **degree of relationship** measures how closely related a person is to the decedent by counting the number of "steps" up the family tree to their nearest common ancestor, and then back down to the other person.

There are two methods for calculating the degree of relationship: the civil law method (used by some states including Wisconsin, and the Uniform Probate Code, to some extent) and the common law method. The steps for calculating the degree of relationship using each method are described below.

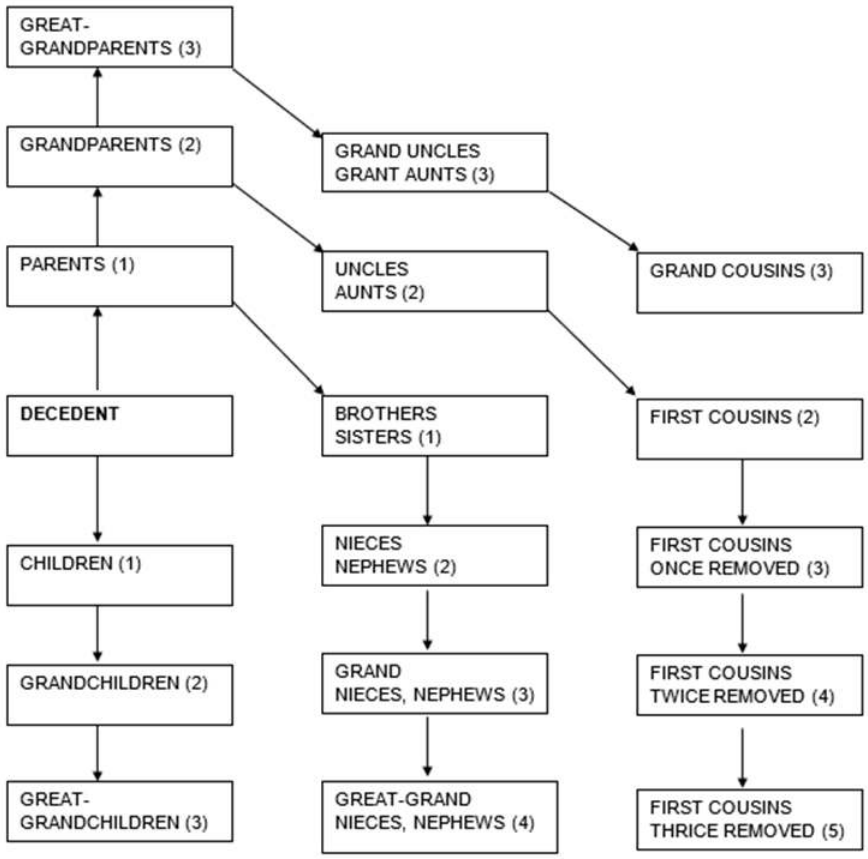
Civil Law Computation

1. Count the number of "steps" up the family tree to the common ancestor of the decedent and the surviving relative
2. Continue counting the number of "steps" back down to the surviving relative. The ending number is the degree of relationship between the decedent and the surviving relative.



Common Law Computation

1. Count the number of "steps" up the family tree to the common ancestor of the decedent and the surviving relative. Write down this number.
2. Begin a new count of the number of "steps" back down to the surviving relative. Write down this number.
3. The higher number is the degree of relationship between the decedent and the surviving relative.



These methods can result in different degrees of relationship.

Example 3.1.1

Decedent's only surviving relatives are Grandnephew and First Cousin.

- Grandnephew: There is 1 "step" up to the common ancestor (the parents) and 3 "steps" down to Grandnephew
- First Cousin: There are 2 "steps" up to the common ancestor (the grandparents) and 2 "steps" back down to First Cousin
- *Civil Law Computation*: the degrees of relationship between the decedent and both Grandnephew and First Cousin are the same (4).
- *Common Law Computation*: the degree of relationship between the decedent and Grandnephew is 3, and between the decedent and First Cousin is 2.

Even this is not the end of the story. In some states that use Civil Law computation, the Grandnephew and First Cousin would equally share the decedent's estate; in other states, the Grandnephew would inherit and the First Cousin would not inherit because the Grandnephew's common ancestor (the parents) is more closely related than the First Cousin's common ancestor (the grandparents). Under Common Law computation, because Grandnephew's degree of relationship is higher than First Cousin's (3 vs. 2), Grandnephew would inherit and First Cousin would not. As a result, it is important to know the details of the intestate succession laws of the decedent's home state.

3.2: Basic Introduction to Testate Succession

As you have seen, intestacy statutes often do a poor job of distributing a decedent's estate in the way the decedent would most likely have intended. Depending on the state, some family members are excluded while others in the same relationship classification (for example grandchildren descended from different children) are not treated equally. Difficulty locating far-flung blood relatives can result in lengthy and expensive probate matters. For these and many other reasons, it is better for a person to die **testate** (with a valid will, trust or other instrument distributing property after the decedent has died).

Definition: Testate

Testate: to die with a valid will, trust or other instrument distributing property after the decedent has died.

Generally, if a person dies with a will or other testamentary document, the terms of that document govern who receives the decedent's property. Even though a will simplifies questions about who receives the decedent's property, there are some potential pitfalls legal practitioners need to be aware of and avoid if possible.

Before diving into the details of testate succession, there is quite a bit of terminology with which you should become familiar:

Definition: Testacy Terminology Relating to Wills

Legacy: a gift of money in a will (traditional terminology).

Bequest: a gift of personal property other than money in a will (traditional terminology).

Devise: a gift of real property in a will (traditional terminology); or, any type of gift in a will (Uniform Probate Code/modern terminology).

Specific Legacy/Bequest/Devise: a gift of a particularly described item, class of personal property or real property.

- "I give my Tesla to my daughter."
- "I give one-half of my tangible personal property located in the barn on my property in Loon Lake to my son."
- "I give my blog and all revenue generated from the advertising to my sister."
- "I give my hunting cabin on Loon Lake to my brother."

Demonstrative Legacy/Devise: a gift of a specific monetary amount to be paid out of a specific fund, or from the sale of a particularly described item of personal property or real property

- "I give $30,000 from the sale of my Tesla to my daughter."
- "I give $5,000 out of my savings account #xxx on deposit at Nicolet Bank to my son."

General Legacy/Devise: a gift of a fixed amount of money from unspecified assets of the estate.

- "I give $100,000 to my daughter."
- "I give one-half of the value of any stock I own at the time of my death to my son."

Residuary Legacy/Devise: a gift of the testator's personal or real property that remains after all other gifts have been distributed.

- "I give the rest, residue, and remainder of my estate, including all real and personal property wherever located that is not previously disposed of in this will to my nephew."

Adeem/ademption: the termination of a gift in a will because the decedent, during his/her lifetime, intentionally canceled a gift in the will by giving the gift to someone else.

Abatement: the process that determines the order in which gifts made in a will are to be used (that is, sold) to pay the decedent's debts, taxes, and expenses.

Lapse: the termination of a gift in a will because the named beneficiary died before the testator. The result is that the gift goes into the residue of the estate.

Forced/Elective share: the decedent's surviving spouse's right to choose to take a statutory share of the decedent's estate, despite contrary provisions in the decedent's will.

Posthumous children: children conceived before but born after the death of their father.

Additional terminology will be introduced in the context of this chapter and upcoming chapters.

Potential Failures of Gifts in a Will

There are several circumstances that can result in the intended person not receiving a gift made in the decedent's will, even if the will is not contested (will contests will be covered in a later chapter). Some of them are caused by the decedent's actions during the decedent's lifetime, and others are caused by the operation of law.

Ademption

A decedent's intentional decision during his/her lifetime to sell, give away or otherwise cancel gifts made in a will cause those gifts to fail. Simply put, the decedent no longer owns the property on his/her date of death. Ademption can also occur if the gift no longer exists because it was destroyed by storm, fire, or other circumstances; if the gift is a living thing (an animal or plant), its death also causes ademption. Only specific gifts can be adeemed. In most states, the substitution of another item of property for the adeemed gift generally does not occur unless the decedent provided for a substitute in the will.

Abatement

If the decedent doesn't specify a source for payment of debts, taxes, and expenses, or if there are insufficient available funds to pay them, gifts in a will may have to be sold or reduced to pay them. State statutes determine the order in which the different types of gifts are used to pay these debts, taxes, and expenses. Usually, the order of abatement is (1) intestate property, (2) residuary legacies/devises, (3) general legacies/devises, (4) demonstrative legacies/devises, and (5) specific gifts.

Lapse

If the person to whom a gift is given in a will dies before the decedent (**predeceases**), the gift fails and goes into the residue of the decedent's estate. Every state has enacted an anti-lapse statute that prevents this from occurring as long as the intended recipient has surviving relatives covered by the statute. Instead of going into the residue of the decedent's estate, the intended recipient's relatives receive the gift. While states differ as to who are the "eligible" relatives, no states include the spouse of the deceased intended recipient. Illinois and Missouri pass the gift only to the intended recipient's relatives who are also the decedent's descendants.

Anti-lapse statutes may not apply if the will's language contradicts the statute:

- "I give my Tesla to my daughter if she survives me." The phrase "if she survives me" demonstrates intent that if the daughter has predeceased, the gift goes into the residue.
- "I give my Tesla to my daughter if she survives me; if she does not survive me, then to my son." By specifying a successor gift recipient (the son), the decedent has demonstrated an intent to override the anti-lapse statute, at least with respect to the daughter. With respect to the son, however, if the son also predeceased the decedent, the anti-lapse statute would apply.

Rights of the Decedent's Surviving Spouse and Minor Children

In a will, a decedent can specifically disinherit anyone except a surviving spouse. Children can be disinherited if the decedent specifically states in the will that the specifically named child(ren) are not to receive any part of the decedent's estate. However, the spouse and minor children may have additional rights or protections relating to the decedent's property under state statutes.

Surviving Spouse's Elective/Forced Share

Most states provide a decedent's surviving spouse with the option to receive what is provided in the decedent's will or to take a statutory amount of the decedent's estate. This elective or forced share has replaced the common law rights of dower and curtesy, and the amount and procedure for claiming it varies by state. In some states, the elective share is the same amount the surviving spouse would receive if the decedent had died intestate; other states have amounts similar to what the spouse would have received under dower or curtesy. Generally, the amount ranges between 30-50% of a defined portion of the estate. Some states require that the marriage last a certain number of years before the spouse can qualify for an elective share or vary the amount of the elective share based on the length of the marriage.

Regardless of the amount provided, most states require the surviving spouse to provide written notice to the probate court of the choice to take the elective/forced share within the time period established by state statute. Thus, it is important for legal practitioners to be aware of this deadline if the decedent has a surviving spouse. Additionally, because the right to an elective share can be waived in a marital agreement, copies of any marital agreements between the decedent and the surviving spouse must be obtained and carefully reviewed.

Omitted Children and Posthumous Children

If a child is simply “left out” of the will without a specific disinheritance clause identifying the child and stating an intent to disinherit the child, most states will presume that the decedent left the child out of the will by mistake and will allow children – especially those born or adopted by the decedent after the will was signed – to receive a share of the decedent’s estate. Some states also apply this presumption to children born or adopted by the decedent.

Posthumous children are those conceived before but born after the death of their father. Under most state statutes, these children receive an intestate share of their deceased father’s estate. State laws vary, or are in some cases nonexistent, regarding the inheritance rights of genetic children conceived years after a parent’s death with the help of frozen sperm, eggs, or embryos. Thus, it is very important during the estate planning interview to determine whether the client has banked sperm, eggs, or embryos; if so, the will must make very clear the client’s intent with respect to those sperm, eggs, or embryos and whether posthumously conceived children shall inherit.

Additional Rights and Protections for the Surviving Spouse and Children

Most states also provide benefits to a decedent’s surviving spouse and minor children that take priority over gifts in the decedent's will (as well as any claims of the decedent's creditors). These statutory benefits include homestead exemptions/allowances, family support/allowances, and other exemptions.

To protect the family from being evicted from the house and land owned by the decedent, many states allow the “head of the household” to designate as the **homestead** the house and adjoining land occupied by the family as the family home. This prevents creditors from being able to force a sale of the house and land to satisfy the decedent’s outstanding debts. Other states protect the family by providing a homestead allowance (a cash payment in addition to any property they receive from the estate) out of the decedent’s estate before any other claims can be made against the estate.

Most states also exempt some of the decedent’s personal property, up to a certain dollar amount, from claims of creditors. **Exempt property** is usually limited to a selection of the decedent’s personal effects; household furniture, appliances, and furnishings; and automobiles.

Finally, because the probate process can be quite lengthy, most states also give the probate court the power to award a monthly cash **family allowance** to the surviving spouse and minor children for their maintenance and support. The family allowance can be provided even if the decedent’s will disinherits members of the family whom the decedent was otherwise obligated to support.

Advantages of Testate Succession

Despite the existence of intestate succession statutes and statutes providing for allowances, exemptions, and other protections, there are clear advantages to having a will and/or a trust. A will or trust allows a person to

- Specify who is to receive the person’s personal and real property, including amounts and conditions of distribution, when the person dies
- Leave property to persons other than immediate family members, such as friends, more distant relatives, caretakers, and even pets
- Make gifts to organizations such as churches, charities, and schools, or to fund research, scholarships, and grants
- Name the person(s) responsible for administering and distributing the decedent’s property after death
- Nominate person(s) as guardians for minor children or other incompetent persons who may inherit from the person’s estate

Written testamentary documents can help to avoid or at least reduce uncertainty and conflict among surviving family members. A detailed and comprehensive estate plan can also alleviate some of the time-consuming, expensive, and complex processes involved in probate.

3.3: Basic Introduction to Succession in Wisconsin

As a martial property state that has adopted only portions of the Uniform Probate Code, Wisconsin's laws of succession are unique and involve some specialized terminology. The following is an overview of those laws and terminology.

Definition: Succession Terminology in Wisconsin

Surviving: a person must outlive the decedent by at least 120 hours (5 days).

Marital property: all property owned or acquired by the spouses during their marriage, including income earned by the spouses and income generated by marital property.

Individual property: any property that is not marital property, including

- Property a spouse owned before the marriage
- Property given by a third party to only that spouse during the third party's life or as a disposition at the third party's death (for example, under a will, trust, or a life insurance policy)
- Any increase in value (appreciation) of individual property (unless it became mixed with marital property)
- Money received as a result of injury claims, unless the recovery relates to repair or replacement of marital property or marital income/earnings
- Property removed from the marital property law pursuant to an "opt-out" agreement that the couple signed

Under Wisconsin statutes, to be considered as **surviving**, a person must outlive the decedent by at least 120 hours (5 days)**.** Otherwise, the person is treated as though the person predeceased the decedent. This rule applies to intestate succession as well as testate succession (unless a different survival requirement is expressly stated in the will or trust), and to joint tenants, owners of survivorship marital property, and other co-owners of property or accounts that are held under circumstances that entitle one or more persons to all of the property or account upon the death of one or more of the others. (Section 854.03, Wis. Stat.)

In Wisconsin, each spouse owns 50% of all of the **marital property** acquired during the marriage, unless the spouses have agreed to a different classification of their property in a written and signed marital contract. As a result, for married decedents, the laws of succession in Wisconsin apply to 50% of the marital property and 100% of the **individual property** owned by the decedent.

Wisconsin Intestate Succession

Because Wisconsin is a marital property state, Wisconsin's intestate succession statutes are quite different from those of other states. Following is an explanation of Wisconsin's basic intestate succession (Section 852.01(1), Wis. Stat.)

For Decedents with a Surviving Spouse

1. **The decedent's surviving spouse receives the entire estate, as long as all of the surviving issue (children, grandchildren, etc.) are also the issue of the surviving spouse.** In other words, the surviving spouse receives everything, as long as the decedent does not have surviving children, grandchildren, etc., from a previous marriage or from a relationship with a person other than the current surviving spouse.
2. **The decedent's spouse only receives 50% of the decedent's individual property if there are one or more surviving issue who are not the issue of the surviving spouse.** In this scenario, the surviving spouse retains his/her 50% interest in the marital property; the other 50% of the decedent's marital property goes to the decedent's issue. Similarly, if the decedent and the decedent's spouse own property as equal tenants in common, the decedent's 50% interest as a tenant in common goes to the decedent's issue, and the surviving spouse retains his/her 50% interest as a tenant in common.
3. **Impact of survivorship rules**: if a spouse's survival by at least 120 hours cannot be established, 50% percent of all the marital property shall be distributed as if it were spouse A's individual property and Spouse A had survived, and 50% of the marital property shall be distributed as if it were Spouse B's individual property and Spouse B had survived. There are some circumstances where this rule does not apply (for example, life insurance that names the spouse as a beneficiary) (Section 854.03(4) and (5), Wis. Stats.)
4. **The decedent's surviving issue, if they are not issue of the decedent and the decedent's surviving spouse, take their share of the decedent's estate per stirpes.** Wisconsin uses "straight" or "strict" per stirpes in this scenario. This means that this portion of the decedent's estate is divided into shares according to the number of issue at the first level of descent with a living descendant.

The examples show what intestate succession of a decedent's individual property and a decedent's share of marital property would look like.

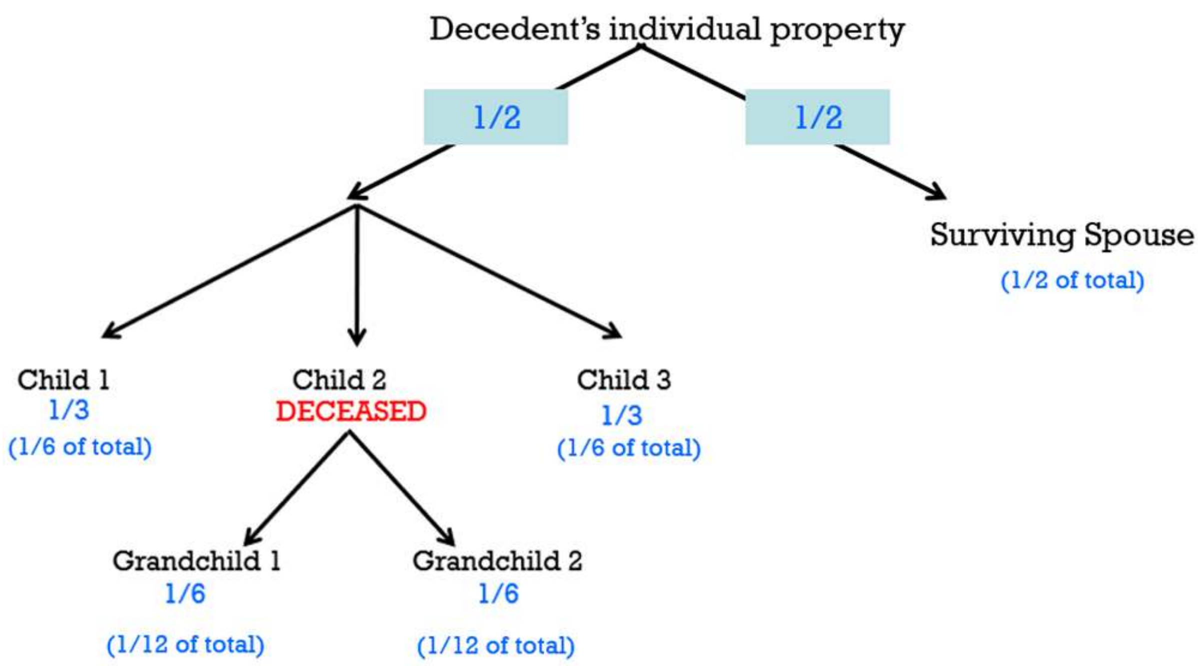


Figure 3.3.1: Decedent's individual property with surviving spouse.

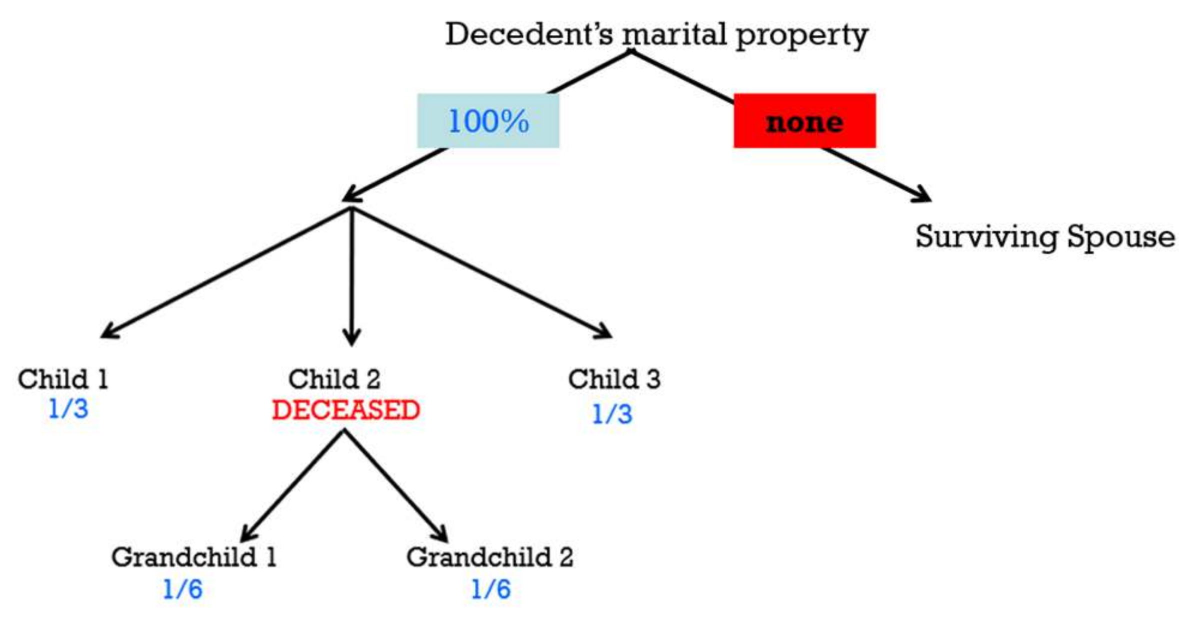


Figure 3.3.2: Decedent's marital property with surviving spouse.

For Decedents with No Surviving Spouse

1. **The decedent's surviving issue, per stirpes**. Remember, Wisconsin uses "straight" or "strict" per stirpes.
2. If there are no surviving spouse or issue, to **the decedent's parents**.
3. If there are no surviving spouse, issue, or parent, to **the decedent's siblings** (and the issue of any deceased sibling per stirpes)
4. If there are no surviving spouse, issue, parent, or sibling, to **the decedent's grandparents** and their issue, per stirpes as follows:
    1. ½ to the decedent's surviving maternal grandparent(s) (and the issue of the deceased grandparents). In other words, ½ to the decedent's mother's parents' side of the family

2. ½ to the decedent's surviving paternal grandparent(s) (and the issue of the deceased grandparents). In other words, ½ to the decedent's father's parents' side of the family
3. If either the maternal side of the family or the paternal side of the family has completely died out (there are no surviving grandparents or issue on that side), then 100% goes to the relatives on the side with the surviving issue.

5. If there are no surviving kin, then to the State. Property that escheats to the State goes to the Wisconsin public education fund.

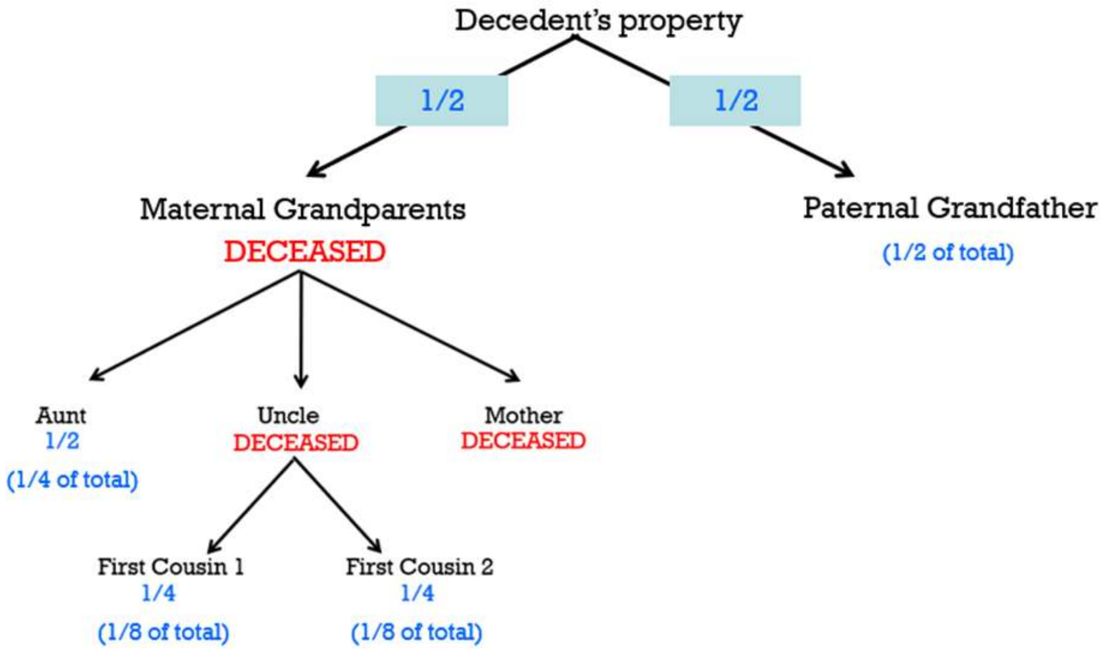


Figure 3.3.3: Decedent's property with no surviving spouse.

Here is a more detailed Wisconsin Intestate Succession Flow Chart.

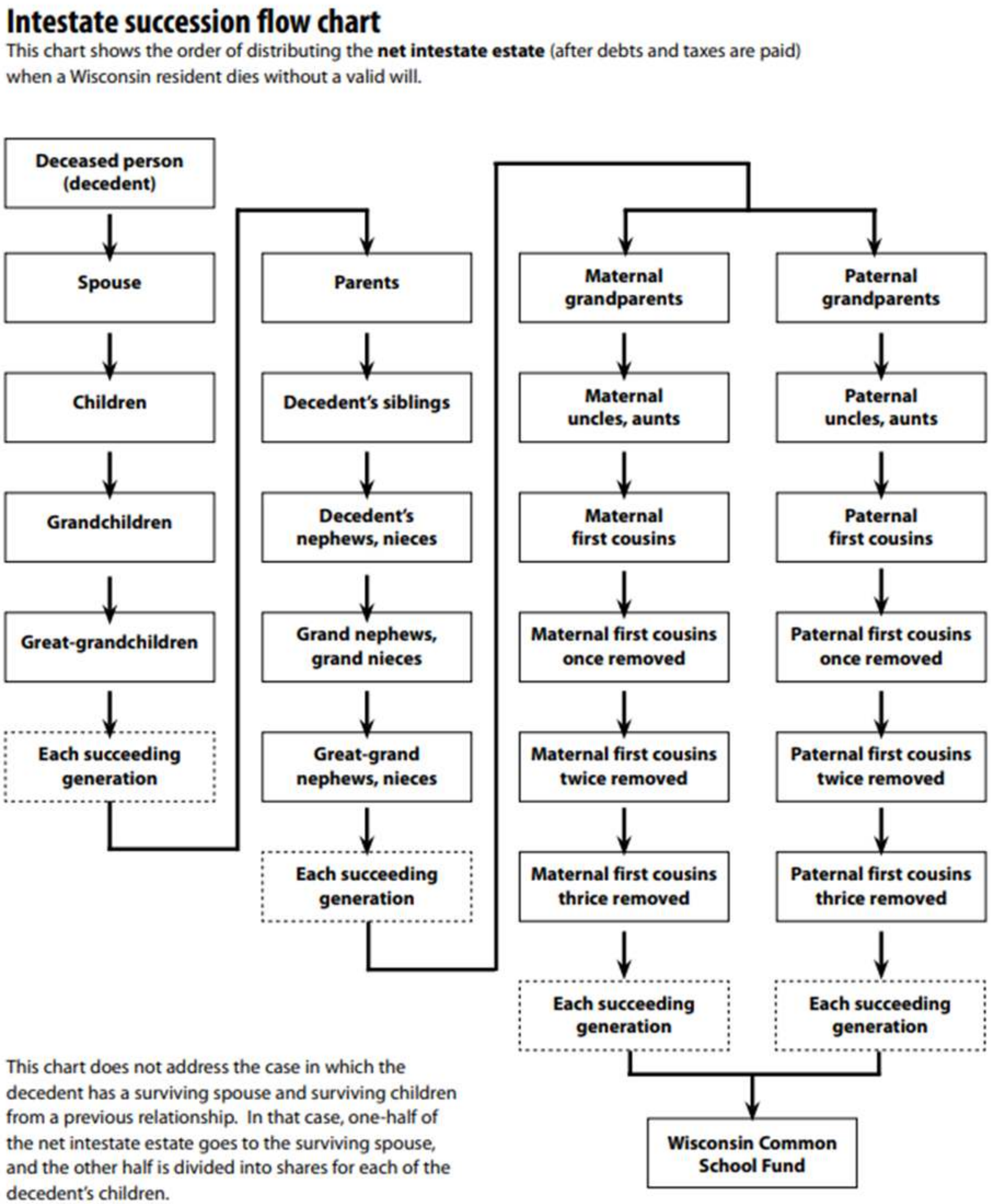


Figure 3.3.4: Intestate Succession Flow Chart (from Family Estate Planning in Wisconsin (B1442)).

Wisconsin Testate Succession

As in other states, a decedent's will or other testamentary document generally removes property covered in that document from Wisconsin's intestacy laws. That being said, the statutes define certain terms relating to succession (section 854.04, Wis. Stat.); it is important for legal practitioners to be aware of those definitions so that the words used in the will or other testamentary document are consistent with the decedent's wishes.

- **Per capita.**"Straight" or "strict" per capita applies. The property is divided into as many shares as there are surviving members of the group or class, and each member is allocated one share.
- **Per capita at each generation.** The UPC's definition of "per capita at each generation" is used. The decedent's property is divided into equal shares at the nearest generation that contains one or more surviving issue. Each survivor in that generation and each deceased person in that generation who left surviving issue are allocated one share. The shares of the deceased persons

in that same generation who left surviving issue are combined for allocation. The combined share is divided among the surviving issue of the persons whose shares were combined as though all of those issue were the issue of one person (so all grandchildren receive the same share, even if one of the decedent's deceased children had 1 child and the other deceased child had 7 children; each would receive a 1/8th share).

- **By representation or per stirpes.** "Straight" or "strict" per stirpes succession applies.
- **Modified per stirpes.** The number of "shares" is determined by the number of surviving issue at the nearest generation. For example, if the decedent had 3 children and all of those children predeceased the decedent, the number of "shares" would be based on the number of surviving grandchildren. So, if there are 10 surviving grandchildren, the decedent's estate would be split into 10 shares, even if 7 of them are descendants of decedent's predeceased first child, 2 of them are descendants of decedent's predeceased second child, and one of them is a descendant of decedent's predeceased third child. Here's how that might look:

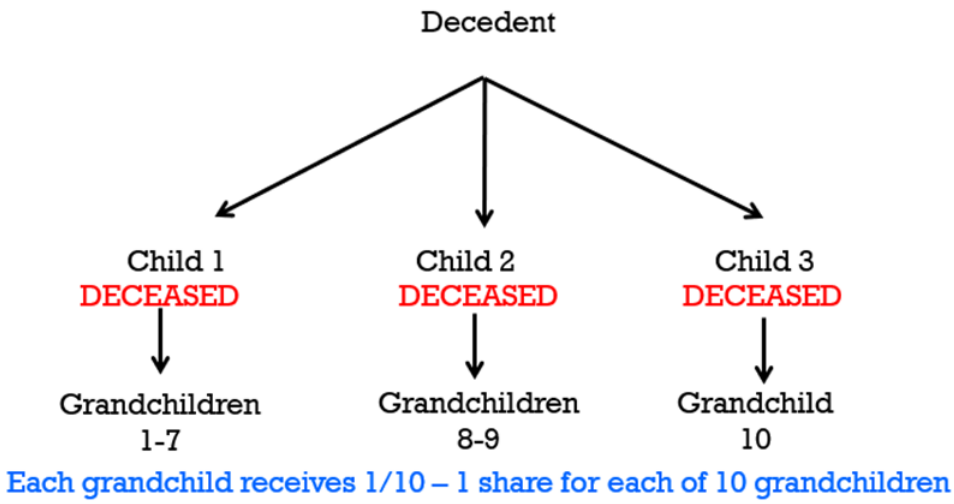


Figure 3.3.5: Decedent with grandchildren but no living children.

Ademption in Wisconsin

Pursuant to Wisconsin Statute §854.08, the common law doctrine of ademption as it relates to specific gifts has been abolished. A testamentary document can provide the intended recipient of the gift with the right to receive monetary payment in lieu of the property under certain circumstances outlined in the statute. Legal practitioners should discuss whether the estate planning client desires to provide these options in the appropriate estate planning documents. Additionally, legal practitioners involved in probating an estate or administering a trust should pay special attention to property sold during the two years prior to the decedent's death, or that was subject to an insurance or condemnation award.

Abatement in Wisconsin

Generally, unless the testamentary document states otherwise, the order in which assets are to be used to pay the decedent's debts, taxes, and expenses is (1) intestate property, (2) residuary legacies/devises, (3) general legacies/devises, and (4) specific gifts. However, this abatement order may not apply to certain shares provided/elected by the decedent's surviving spouse and/or minor children. (Section 854.18, Wis. Stat.)

Lapse in Wisconsin

Generally, unless the testamentary document states otherwise, Wisconsin does provide anti-lapse protection to the issue of a predeceased intended recipient of a gift made in a testamentary document, particularly with respect to issue of named grandparents or stepchildren of the decedent. (Section 854.06, Wis. Stat.)

Spousal Elective Share in Wisconsin

As a marital property state, Wisconsin's surviving spouse's elective share is defined as 50% of the augmented deferred marital property estate. The election does not impact the decedent's individual property. The election is designed to prevent the surviving spouse from being disinherited of property that would have been classified as marital property if the property had been acquired by the spouses under circumstances to which Wisconsin's Marital Property Act would have applied (known as deferred marital property). The simplified description of the election is that it applies if the decedent spouse was domiciled in Wisconsin at the time of death and allows the surviving spouse to elect to receive a monetary amount equal to 50% of the total combined value of both spouses' actual marital property and deferred marital property. Mostly, it impacts couples married outside the state of Wisconsin who acquire property and subsequently move to Wisconsin, as well as couples married in Wisconsin prior to January 1, 1986. (Section 861.02, Wis. Stat.) Thus, it is important to know when and where the decedent and surviving spouse were married when determining the applicability of this election.

Omitted Children in Wisconsin

Children born to or adopted by the decedent after the date of the will (and thus omitted from the will) receive a share of the decedent's estate unless evidence demonstrates the omission was intentional, or the decedent provided for the omitted child in a transfer separate from the will and evidence shows the decedent's intent to substitute that transfer for a share under the will. Omitted children who were alive at the time the will was signed by the decedent may receive a share of the decedent's estate if clear and convincing evidence (the middle burden of proof) demonstrates that the omission was a mistake, rather than intentional. The omitted child's share depends on many factors, including whether the decedent has other surviving children who also were omitted by mistake; whether the decedent has other surviving children who were included in the will, and the amount the will provides to those surviving children; and whether the will provides all or nearly all of the estate to the omitted child's surviving parent. Once the will is allowed for probate, omitted children must make a claim within 6 months.

Posthumous Children in Wisconsin

Wisconsin statutes provide that a person was conceived prior to the decedent's death and born afterward, that child/issue can inherit along with other children/issue in the same class, as long as the person survives at least 120 hours after the birth. This statute does not apply if the testamentary document contains a provision that shows the decedent's intent that such persons would not be included.

Paralegal Roles

Whether a client comes to the law office requesting an estate plan or assistance with a probate matter, the paralegal's role is to support the supervising attorney in providing legal services and act as a liaison between the client and the supervising attorney. Typical tasks include interviewing the client, requesting documents and other information from the client, conducting factual investigation and/or legal research, and drafting documents as directed by the supervising attorney. As you can see, legal practitioners in this practice area need to obtain a substantial amount of detailed information regarding the property, relatives, and intent of the client/decedent.

CHAPTER OVERVIEW

4: Estate Planning Documents

4.1: Basic Introduction to Non-Testamentary Estate Planning Documents

Most people, when they think of estate planning, think about documents that direct what will happen with their property after they die. However, a comprehensive estate plan will also include documents that express the person's desires regarding decisions that must be made during the person's lifetime impacting the person's property and finances, healthcare, organ donation, funeral arrangements, and final disposition of the person's body. There are several documents that provide for decision-making authority if the person is unable to do so. They are sometimes referred to as "non-testamentary" or ***inter vivos*** (during life) because they are effective during the person's life, with most of them expiring upon the person's death. This chapter will explore those documents.

Definition: Terms Relating to Powers of Attorney

Power of Attorney: a document that gives one or more persons the power to act on behalf of the principal.

Principal: the person signing and granting power to another person in a power of attorney document.

Agent/attorney-in-fact: the person named to act on the principal's behalf.

Springing power of attorney: a power of attorney that is effective only upon the occurrence of a future event.

Durable power of attorney: a power of attorney that continues to be effective even if the principal is incapacitated.

Guardian: a person appointed by a court to act on behalf of an incapacitated or incompetent person when there is no valid power of attorney

Ward: an incapacitated or incompetent person, or a person under the age of 18 who has a court-appointed guardian.

Durable General Power of Attorney/Power of Attorney for Finances

An important part of lifetime planning is the power of attorney. A power of attorney is accepted in all states, but the rules and requirements differ from state to state. A **power of attorney** gives one or more persons the power to act on your behalf as your agent. The power may be limited to a particular activity, such as closing the sale of your home, or be general in its application. The power may give temporary or permanent authority to act on your behalf. The power may take effect immediately, or only upon the occurrence of a future event, usually a determination that you are unable to act for yourself due to mental or physical disability. The latter is called a "**springing**" power of attorney. A power of attorney may be revoked, but most states require written notice of revocation to the person named to act for you.

The person named in a power of attorney to act on your behalf is commonly referred to as your "**agent**" or "**attorney-in-fact.**" With a valid power of attorney, your agent can take any action permitted in the document. Often your agent must present the actual document to invoke the power. For example, if another person is acting on your behalf to sell an automobile, the motor vehicles department generally will require that the power of attorney be presented before your agent's authority to sign the title will be honored. Similarly, an agent who signs documents to buy or sell real property on your behalf must present the power of attorney to the title company. Similarly, the agent has to present the power of attorney to a broker or banker to effect the sale of securities or opening and closing bank accounts. However, your agent generally should not need to present the power of attorney when signing checks for you. (American Bar Association, Power of Attorney)

A **durable**, general financial power of attorney allows your agent to handle a wide range of financial matters. In this context, "durable" means it stays in place after you are incapacitated. The person you choose as your Financial Power of Attorney can handle matters such as:

- Writing checks and paying bills
- Buying or selling furniture, a car, or a home
- Corresponding with financial institutions
- Cashing Social Security checks, rent checks, or other income you receive
- Managing your investments
- Operating your business
- Updating beneficiaries on your accounts
- Talking with your insurance providers, such as Medicaid
- Speaking with your accountant, your investment advisor, and the IRS on your behalf
- Filing your taxes (FindLaw.com, Financial Power of Attorney)

A durable power of attorney can take effect in one of two ways. It normally takes effect immediately when it is signed and notarized. You can also delay the effective date until a future event, such as your incapacity, occurs. A power of attorney with a delayed effective date is known as a “springing” power of attorney. A physician, a judge, or some other person you designate can determine if you are incapacitated. A lawyer can advise you which type of power of attorney is best for you. (Wisbar.org, Wills/Estate Planning)

If you do not have a Durable Power of Attorney and you become incompetent, it may be necessary for your family to ask the court to appoint a **guardian** for you. Appointing a guardian takes time and can be cumbersome, public, and expensive. The family must hire a lawyer who will arrange for a court hearing. A physician must provide evidence that you cannot handle your own affairs. If you are physically able, you must go to the courthouse to hear the testimony that you are incompetent.

Many people mistakenly think that it’s not necessary to have a durable power of attorney if they don’t have much money or if they hold all property jointly with a spouse or someone else. However, there are many actions an agent would need specific legal authority to do – regardless of how much (or little) money you have or whether you hold most of your assets jointly with another person. Some examples include: applying for work-related disability or income continuation benefits and public benefits such as Social Security disability or Medicaid; accessing or changing retirement plans; filing insurance claims or appealing denials; signing tax forms; selling a home to move somewhere more accessible; contracting for health care services; and hiring accountants or lawyers.

A durable power of attorney becomes effective immediately upon signing and is not terminated by the incapacity of the principal (person giving the power). The principal vests the agent — sometimes called the attorney-in-fact, who can be anyone and not necessarily an attorney-at-law — with special powers to act for or on behalf of the principal in various financial matters. Durable powers of attorney can become or remain effective during the principal’s incapacity. As such, they are powerful instruments for establishing financial management during incapacity. A properly drafted durable power of attorney can also help avoid guardianship — a court proceeding that establishes incompetency and places the incompetent person’s (**ward’s**) assets under court supervision.

In Wisconsin, if the power of attorney grants the agent the authority to do all acts that a principal could do, the agent has the general authority to carry out specific powers described in Chapter 244. The authority to make gifts; create, amend, revoke, or terminate an inter vivos trust; create or change rights of survivorship, and create beneficiary designations are not included in the general authority and must be written as special instructions. The power of attorney is effective immediately upon signing, unless the principal specifically states that it becomes effective at a future date or occurrence that will activate the powers, such as his or her incapacity. (Wisbar.org, Powers of Attorney)

A durable power of attorney ends at your death. Your agent retains no further authority to handle your finances. If you want your agent to settle your financial affairs after you die, you need to name that person as your personal representative in your will. (Wisbar.org, Wills/Estate Planning)

Why would anyone give such sweeping authority to another person? One answer is convenience. If you are buying or selling assets and do not wish to appear in person to close the transaction, you may take advantage of a power of attorney. Another important reason to use power of attorney is to prepare for situations when you may not be able to act on your own behalf due to absence or incapacity. Such a disability may be temporary, for example, due to travel, accident, or illness, or it may be permanent. (American Bar Association, Power of Attorney)

Advance Directives for Healthcare

With the increasing ability of medical science to sustain our lives, people are living much longer than ever before. Unfortunately, as we grow older, or if we experience health challenges, we may find ourselves in a position in which decisions need to be made as to how we wish to be treated in a variety of medical situations. This is especially true at the end of our lives, but can be true at any time as a result of the impact of an accident, injury, or illness. If we are in a condition such that we no longer can express our preferences about treatment, decisions will be made for us by others if we have not planned for our own treatment in advance. Advance health care directives allow us to deal with these situations. Without such directives, our families may find it necessary to obtain court orders to deal with our medical situations.

State laws vary concerning the appropriate documents to cover these situations. All fifty states permit you to express your wishes as to medical treatment in terminal illness or injury situations, and to appoint someone to communicate for you in the event you cannot communicate for yourself. Depending on the state, these documents are known as "living wills," "medical directives," "health care proxies," or "advance health care directives." Some states have a standardized or statutory form, while other states allow you to draft your own document.

Regardless of the name your state gives to these documents, their purpose is to allow you to express your preferences concerning medical treatment in an extreme medical situation when you cannot communicate, including at the end of your life. By expressing such preferences in a written legal document, you are ensuring that your preferences are made known. Physicians prefer these documents because they provide a written expression from you as to your medical care and designate for the physician the person he or she should consult concerning unanswered medical questions. Rather than the physician having to obtain a consensus answer from your family as to your treatment, the physician knows your preferences and knows who you want to provide decisions when you cannot do so. Also, providing such information and designating a health care proxy means that the physician knows whose direction is to be followed in the event your family disagrees as to what medical treatment you would want.

Living Wills

A living will is your written expression of how you want to be treated in certain medical circumstances. Depending on state law, this document may permit you to express whether you wish to be given life-sustaining treatments in the event you are terminally ill or injured, to decide in advance whether you wish to be provided food and water via intravenous devices ("tube feeding"), and to give other medical directions that impact your care, including the end of life. "Life-sustaining treatment" means the use of available medical machinery and techniques, such as heart-lung machines, ventilators, and other medical equipment and techniques that may sustain and possibly extend your life, but which may not by themselves cure your condition. Be very careful signing any such document without reviewing the implications to you. For example, some of the commonly used clauses in living wills may forbid the provision of assisted breathing, including devices you presently may be using if, for example, you are living with COPD. Most important, many of the provisions of such a document have profound religious and philosophical implications. Be certain that whatever you sign is consistent with your beliefs and wishes. In addition to terminal illness or injury situations, most states also permit you to express your preferences as to treatment using life-sustaining equipment or tube feeding for medical conditions that leave you permanently unconscious and without detectable brain activity.

A living will applies in situations in which the decision to use such treatments may prolong your life for a limited period of time, and not obtaining such treatment would result in your death. Having a living will does not mean that medical professionals would deny you pain medications and other treatments that would relieve pain or otherwise make you more comfortable. Living wills do not determine your medical treatment in situations that do not affect your continued life, such as routine medical treatment and non-life-threatening medical conditions. Most states permit you to include other medical directions that you wish your physicians to be aware of regarding the types of treatment you do or do not wish to receive. In all states, the determination as to whether you are in such a medical condition is determined by medical professionals, usually your attending physician and at least one other medical doctor who has examined you or reviewed your medical situation. (American Bar Association, Living Wills, Health Care Proxies, & Advance Health Care Directives)

Creating a living will reduces the likelihood of emotional disputes over your medical and end-of-life care. Taking your health care wishes into your own hands can provide peace of mind for your family. Your loved ones will know your wishes if you face a terminal illness or serious medical condition. (Living Will & Health Care Directive Laws - FindLaw). Your living will is generally extinguished upon your death but can remain effective after your death for limited purposes, such as the disposition of your remains and organ donation. (Findlaw.com, The Power of Attorney, Living Will, and Your Healthcare)

Health Care Proxy

A "health care proxy," sometimes called a "power of attorney for health care," "health care surrogate," or "durable medical power of attorney," is a durable power of attorney specifically designed to cover medical treatment. You appoint a person and grant to him or her the authority to make medical decisions for you in the event you are unable to express your preferences about medical treatment. Most commonly, this situation occurs either because you are unconscious or because your mental state is such that you do not have the legal capacity to make your own decisions. … Normally, one person (not multiple persons to act at one time) is appointed as your health care proxy. It is quite common, however, for you to appoint one or more alternate persons (successors) in the event your first-choice proxy is unavailable. (American Bar Association, Living Wills, Health Care Proxies, & Advance Health Care Directives)

As in the case of a living will, medical professionals will make the initial determination as to whether you have the capacity to make your own medical treatment decisions. When a patient is unconscious, severely brain damaged, highly intoxicated, or for other reasons cannot understand the available treatment options, the patient clearly is incapacitated, or unable to make his or her own decisions. However, if the patient has some understanding of what is happening but judgment is clouded by factors such as fear or mental or physical illness, then determining mental capacity is more difficult. Wisconsin laws on advance directives (see below) define "incapacity" as the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual is not able to manage his or her health care decisions. Usually, the patient's doctor initially determines incapacity, often with input from family members. When the patient's doctor has doubts about the patient's comprehension, he or she often consults with another health care provider with appropriate expertise.

A health care power of attorney is more powerful and flexible than a living will. A health care power of attorney can be drafted so that your health care agent has the authority to make a variety of medical decisions for you, as opposed to a living will, which only directs when artificial life support is to be withheld.

Some people will have both a Living Will and a Health Care Proxy. In that situation, the person appointed as health care proxy cannot contradict the terms of the Living Will. Instead, the health care proxy is there to ensure compliance with the Living Will, to clarify or act consistently with the Living Will if terms are absent or vague with respect to the current situation, or to act in case the Living Will is declared invalid. (Wisbar.org, Health Care)

These documents usually take effect when your doctor declares that you are incapacitated. Typically, this means you can no longer communicate or make your own health care decisions, often because of a terminal illness, permanent unconsciousness, or some other end-stage condition. Like a living will, your power of attorney for healthcare is generally extinguished upon your death but can remain effective after your death for limited purposes, such as the disposition of your remains and organ donation. (Findlaw.com, The Power of Attorney, Living Will, and Your Healthcare)

Organ and Tissue Donation

In many states you can include in your advance directive your preference to become an organ or tissue donor at the time of death. State law varies, and you should check with your attorney. Even if your state is one in which your driver's license contains an organ or tissue donor statement, you need to let your health care proxy, your family, and your physician know your desire to become a donor. In some states you also need to be registered as an organ and tissue donor. (American Bar Association, Living Wills, Health Care Proxies, & Advance Health Care Directives)

You can use a living will or advance health care directive to state your intent to donate certain organs or tissues, such as your heart, lungs, kidneys, or eyes. This document can designate organs or tissues for transplant use or for medical research, or both. You may want to discuss your preferences with your family members in advance to avoid any efforts (intentional or unintentional) to override your plans after your death. Sometimes a person nearing the end of their life plans to donate their entire body to a medical institution for research. It can be returned to their loved ones afterward for burial or cremation. For medical reasons, a full body donation is an alternative rather than a complement to an organ donation. (Justia.com, End of Life Decisions)

Funeral Planning and Final Disposition

Beyond the estate planning documents that you devise, you may want to provide your wishes for certain arrangements in the aftermath of your death. For example, you may have a preference for how your life should be commemorated in a memorial service or funeral. Planning a funeral in advance can help avoid disagreements among family members over what their loved one would have wanted. You can consider whether you would prefer to have a traditional funeral or a memorial ceremony, or a combination. There also may be less common alternatives to explore, such as a visitation or a wake. A funeral plan can outline very specific requests for the people whom you want to speak at a service, the place where it should occur, and the clothes that your body should wear, among other things. (Justia.com, End of Life Decisions)

Making end-of-life plans involves several practical considerations, including the following:

- How would you like your remains handled when you die?
- Who will you entrust to carry out your wishes?
- Who will make the financial decisions relating to your funeral arrangements?
- How will funeral expenses be paid? (FindLaw.com, Funeral Planning FAQ)

(Justia.com, End of Life Decisions & Legal Implications)

A funeral plan could also provide guidance on how family members should pay for the funeral. Life insurance or payable-on-death accounts provide immediate cash with which to pay for a funeral before probate proceedings. (Justia.com, End of Life Decisions &

Legal Implications). Planning for payment in this way relieves your loved ones from worrying over costs and how to pay them when they are already processing their grief over your death.

- **Life Insurance:** Sometimes known as “burial insurance" or “funeral insurance," a life insurance policy can cover your end-of-life expenses. Instead of one large funeral bill, you can pay an affordable monthly premium in exchange for a sizable payout when you die. Because life insurance proceeds avoid probate, the beneficiary receives the funds directly from the insurance company.
- **Payable-On-Death (POD) Account:** Also known as a “Totten trust," a POD account is a financial account (e.g., a bank account, retirement account, investment account, IRA, etc.) with a valid beneficiary designation. When the owner dies, the assets avoid probate and immediately transfer to the beneficiary. You can provide just enough funds to cover end-of-life expenses.
- **Funeral Trust:** A trust is a property arrangement where a “grantor" (sometimes known as a “trustor" or “settlor") transfers assets to be managed by a “trustee" on behalf of a “beneficiary" in a funeral trust. The grantor sets aside assets to cover the grantor's end-of-life expenses. The trustee may be an institution (e.g., a trust company or bank) or a trustworthy individual. The beneficiary would be a funeral establishment of your choice.
- **Veteran Benefits:** Veterans, service members, and some family members may be eligible for burial in a Veteran's Association National Cemetery. At no cost to the family, benefits include burial, perpetual care, a government headstone, a burial flag, and a Presidential Memorial Certificate. Cremations are also available with full death benefits. Some veterans may also be eligible for a burial allowance. (FindLaw.com, Funeral Planning FAQ)

Do not put instructions for your funeral, organ and tissue donation, or final disposition of your body in your will. Because wills are often not read or accessible until weeks, sometimes months, after the testator's death, it will likely be too late to carry out these instructions (FindLaw.com, Funeral Planning FAQ). Better places for these instructions include a Living Will or a Letter of Last Instructions.

4.2: Basic Introduction to Trusts

As mentioned previously, an important component of a comprehensive estate plan includes documents that help ensure that a person's property will be preserved for and distributed to the people whom the person desires to benefit from their property and that those who are benefiting from the property receive the largest distribution possible with a minimum amount of delay. Specifically, estate planning allows an individual to decide exactly who will benefit from their estate, and to what extent. Additionally, these documents allow the client, rather than the court, to make important decisions regarding who should be in charge of the estate and who should be appointed as guardian/custodian for minor children and/or incompetent family members. This chapter will introduce several documents that can achieve these goals.

"Totten" Trusts

"Totten trusts" or "poor man's trusts" are also known as **"Payable-on-Death"** or "**Transfer-on-Death"** accounts. Adding a POD or TOD designation to financial investments and other documents of title allows the client to maintain complete control over the property during his/her lifetime and provide immediate transfer to the desired person when the client dies. Typically, the beneficiary can access the funds simply by providing a certified copy of the death certificate. Depending on the state, this designation can be added to

- Bank accounts, including checking, savings, money market, and certificates of deposit (CDs)
- Individual Retirement Accounts (IRAs)
- Investment accounts, including brokerage accounts, mutual funds, stocks, and securities
- Savings bonds
- Titles for vehicles
- Deeds for real property

While multiple beneficiaries can be named, a POD or TOD designation does not allow for an alternate beneficiary to be named in the event the primary beneficiary predeceases the client. Additionally, these accounts may also be subject to claims of a surviving spouse or the deceased's creditors.

A POD/TOD designation cannot be made or changed in a will or other document. Instead, the financial institution's form(s) must be used to create the account; any desired changes must be made through the same institution.

Trust Terminology

Before diving into the details of trusts, there is some terminology with which you should become familiar:

Definition: Terms Related to Trusts

Trust instrument/document: a written document creating a trust. Often called a declaration of trust.

Trust agreement: a contract between the settlor and the trustee that creates a trust and is signed by both parties.

***Inter vivos*:** during one's lifetime.**Settlor/Trustor/Grantor:** a person who creates a trust

Capacity: the legal ability or power to do something

Trustee: the person or institution named by the settlor to take charge of, administer, and distribute property placed into the trust

Fiduciary: a person appointed to serve in a position of loyalty, trust, and confidence. In the context of a trust, this person controls and manages property exclusively for the benefit of others. A fiduciary's conduct is held to the highest ethical standard.

Beneficiary: someone receiving property or money pursuant to the terms of the trust

Contingent beneficiary: someone who will receive property or money only if one or more conditions occur or are satisfied

Legal Title: The form of ownership of trust property held by the trustee, giving the trustee the right to control and manage the property, but only for another's benefit.

Equitable Title: The form of ownership of trust property held by a beneficiary. A future right to receive full ownership of the property, and a current right to benefit from the property.

Trust Principal: The initial property, money, or capital that is placed into the trust. Think of it as the initial investment; for example, a house placed in a trust would be the principal.

Trust income: Any income generated by the property owned by the trust. For example, interest or dividends on investment accounts, or rental income received from the house placed into the trust.

Testamentary trust: a trust that is created by a settlor's will.

Trust Basic Requirements

Written Document

You may recall learning in a previous legal studies class that certain types of documents must be in writing to be enforceable pursuant to the statute of frauds. One memory trick for the types of documents is **MYLEGS: M**arital contracts; contracts in effect for at least one **Y**ear; transactions involving **L**and; transactions involving an **E**xecutor (or an **E**state); transactions involving **G**oods worth more than $500; and transactions involving a **S**urety. Trusts involve an Estate, and so they are required to be in writing.

Persons Involved in a Trust

Three roles are created in a trust: the **settlor**, the **trustee**, and the **beneficiary**. There can be multiple persons in each role; typically, there is only one settlor and only one active trustee (though most trusts will also name at least one successor trustee to step in if the primary trustee is unable or unwilling to fulfill the fiduciary duties of a trustee). The settlor can also name himself/herself as one of the trustees and/or one of the beneficiaries, as long as there is at least one other trustee and/or one other beneficiary also named.

Settlor

The settlor must have both intent to create a trust and capacity to create a trust. **Capacity** is the legal ability or power to do something, such as enter into a relationship or contract. Capacity typically has two components: mental competence and minimum age. **Mental competence** refers to a person's ability to understand the nature of the relationship or contract, which can be impacted by mental health conditions, alcohol or drugs. The **minimum age** for trusts is determined by State law and is typically 18 or 21 years of age.

Trustee

The trustee is the person who holds **legal title** to the property in the trust, and who is responsible for managing the trust property. The trustee can be a legal person (such as a trust company) or a natural person (a human being). Like the settlor, the trustee must be willing and able to act as trustee and must have contractual capacity. Unless a trust company is named, the settlor should name at least one successor trustee to step in if the primary trustee is unable or unwilling to fulfill the fiduciary duties of a trustee. If a capable trustee is not named, the court will appoint one.

The trustee has the powers that are provided in the trust and must follow the instructions in the trust. Typically, the trustee is given broad powers similar to the rights an owner in severalty would have; the exercise of those powers is limited by the trustee's fiduciary duty to exercise those powers solely for the benefit of the beneficiary.

Beneficiary

The beneficiary holds **equitable title** to the property in the trust. There can be more than one beneficiary and even more than one type of beneficiary. Beneficiaries can be natural persons, pets, charities or other organizations, or "charitable/public causes." Unlike the settlor and the trustee, beneficiaries do not need to have contractual capacity.

Beneficiaries must be sufficiently identified by name, class, or specific relationship; failure to do so is fatal to the trust. When naming individuals as beneficiaries, the settlor should use the individual's full legal name and not just a nickname, and it is helpful to identify the person's relationship to the settlor (for example, "my daughter RaeAnn Josephine Clarbots, also known as "Sunny"). When naming a class of beneficiaries, settlors should be careful to describe a class that clearly includes some people while excluding others (for example, "my grandchildren"); vague descriptions such as "my family" or "my relatives" or "my friends" can also be fatal to the trust.

Similarly, when naming a charity as a beneficiary it is advisable to use the charity's full legal name and supply at least the city and state where the charity is located (for example, the University of Wisconsin, located in Madison, Wisconsin). If the funds are to be used for a specific purpose, that should also be described ("for the purpose of providing scholarships to single mothers who major in the field of Political Science"). Sometimes, the identified charity ceases to exist or the stated charitable/public purpose is no longer necessary when the time comes to pay out trust funds. In that situation, the court is allowed to substitute a similar charity or charitable/public purpose under what is known as the **Cy-Pres doctrine**. For example, in In re Bletsch's Estate, 25 Wis. 2d 40, 130 N.W.2d 275 (1964), the document named as a beneficiary the "Masonic Home for Crippled Children in Illinois," a charitable organization that did not exist at the time the funds were to be paid. Instead, the court allowed a payout to the Shriner's Hospital for Crippled Children in Illinois because that hospital was "an identifiable beneficiary whose charitable or public program and goals are reasonably close to those expressed" in the document.

Property Involved in a Trust

A trust also requires that the settlor transfer existing property owned by the settlor to the trust. For personal property that does not have a title or other document indicating ownership, transferring ownership to the trust involves specifically describing the property (or class of property) and stating an intent to transfer ownership of it expressly in the trust instrument. When describing the property, it is important to include enough detail so that the trustee can identify the property; such details might include a physical description of the property as well as its location (for example, all furnishings and personal effects located in any house(s) I own). Some trust instruments include a Schedule or Exhibit at the end of the instrument listing assets such as antiques, collectibles, jewelry, copyrights, patents, trademarks, and the like.

For real property and personal property that has a title or other document indicating ownership, this document must be changed to show ownership by the trust. For real property, the settlor must sign a deed transferring title to the real property to the trust. Vehicles must be retitled in the name of the trust. Financial investments (such as checking and savings accounts, certificates of deposit, money market accounts, brokerage accounts, or other investment accounts) must also be retitled in the name of the trust.

A trust can also be named as the beneficiary of death benefits to be paid under life insurance policies, retirement accounts, and annuities. Each insurance company and plan administrator would need to be contacted to ensure proper designation of the trust as beneficiary, as well as to understand how naming the trust as a beneficiary might impact other payment or investment rights and obligations.

Great care must be taken to ensure all of the settlor's property has been properly transferred to the trust. Any property that was not properly transferred to the trust that does not have survivorship rights or another beneficiary designation will have to go through the probate process. To avoid the application of intestacy laws, the client should also have a **pour-over will** that transfers any assets owned outside of the trust into the trust after the client dies. The pour-over will still go through probate; however, the assets will be distributed to the trust rather than pursuant to intestacy laws.

> **Definition: Pour-over will**
>
> **Pour-over will:** a document that transfers any assets owned outside of the client's *inter-vivos* trust into the trust after the client dies.

Trust Termination

A trust should specify when it will terminate/end. Typically, a trust will terminate after a certain number of years, when the beneficiaries reach a certain age (for example, 25 years old), or a certain condition or requirement occurs or is met (for example, the beneficiary earns a college degree). Once the beneficiary reaches the required age or fulfills the condition, the trust terminates and the remaining property is distributed. The limits on the types of allowable conditions and how different conditions might be applied are discussed in a later chapter. Of course, if all of the trust beneficiaries die, or if all of the trust property is distributed, this will also cause the trust to terminate.

Types of *Inter Vivos* (Living) Trusts

An ***inter vivos* trust** is one that is created and active during a person's lifetime. In this document, the settlor transfers ownership of property owned by the settlor to the trust, which is then managed by the trustee named in the trust for the benefit of the named beneficiaries, pursuant to the instructions provided by the settlor in the trust. Although there can be other purposes for an *inter vivos* trust, the primary purpose is to protect the property and the beneficiaries from poor decisions and from claims by third parties. These trusts typically include detailed terms regarding who receives how much trust property during the settlor's lifetimes as well as after the settlor dies, under what circumstances, and for what purposes. As such, *inter vivos* trusts are a sort of hybrid between non-testamentary and testamentary estate planning documents. A settlor can create one of two types of *inter vivos* (living) trusts: revocable and irrevocable.

Revocable *inter vivos* Trusts

This type of trust can be modified or canceled (revoked) at any time by the settlor. Usually, the grantor names himself/herself as the primary trustee and names a successor trustee who takes over when the grantor dies. The settlor also is often one of the beneficiaries of the trust, with successor beneficiaries receiving the trust property after the settlor dies. The main benefit of a revocable *inter vivos* (living) trust is that when the settlor dies, no probate proceedings are required. Avoiding probate eliminates delays in trust property being available to beneficiaries, ensures financial privacy, reduces costs of administering the trust, and decreases potential estate taxes because trust property is not part of the decedent settlor's probate estate. Another benefit is that the trust allows the settlor to have complete control over the property unless/until the settlor becomes incapacitated or dies; when that occurs, the successor trustee immediately takes over management and control. The potential downsides of a revocable *inter vivos* (living) trust are that the trust property is not protected from claims of the settlor's creditors, and the value of the property could interfere with the settlor's eligibility for Social Security/Medicare assistance with expenses related to long-term care.

Irrevocable *inter Vivos* Trusts

This type of trust *cannot* be modified or canceled (revoked) by the settlor. Essentially, the property is no longer owned by the settlor but is owned by the trust. As a result, unlike the revocable trust, property in this trust is protected from claims of the settlor's creditors; irrevocable trusts are also taxed separately from the settlor (or the settlor's probate estate, if there is one), sometimes at a lower tax rate. Additionally, if a settlor wishes to name himself/herself as a trustee, an additional person must be named as a co-trustee, effective immediately (and not as a successor).

Some clients create an **irrevocable life insurance trust (ILIT)** to help with the payment of certain after-death expenses and/or taxes. The settlor either purchases a life insurance policy and names the ILIT as the beneficiary to receive a payout of the life insurance policy's death benefits, or changes the beneficiaries of an existing life insurance policy to the ILIT and then transfers ownership of the life insurance policy to the trust. The settlor also typically transfers money into the trust for the purpose of paying premiums. The settlor cannot be the beneficiary of the ILIT; however, the settlor's spouse and/or children can be named as beneficiaries.

Trusts for Special Purposes

In addition to the reasons mentioned above for creating trusts, some clients may desire to add special protections for their trust beneficiaries, either with respect to finances, creditors' claims, taxes, or some combination of these. Specialized trusts include:

- **Spendthrift trusts.** These trusts contain a clause that prohibits the beneficiary from receiving a full distribution of all of the trust property (typically periodic payments are defined) and also prohibits the beneficiary from assigning or transferring to anyone else (especially a creditor) the beneficiary's right to payments from the trust. Of course, once the payments are made out of the trust, they are subject to claims by the recipient's creditors; however, the trust funds cannot be used as collateral to secure a loan.
- **Special needs trusts.** These trusts are written with specific clauses and provisions designed to protect a disabled or incompetent beneficiary while preserving the ability to qualify and remain eligible for government benefits/assistance.
- **A-B trusts.** These trusts are used by spouses, often as a tax-saving device. The surviving spouse receives the "A part" of the trust, and the "B part" of the trust goes into a separate trust that the surviving spouse can use for limited purposes during the surviving spouse's lifetime, after which the "B part" goes to the couple's heirs.
- **QTIP (Qualified Terminable Interest Property) trusts.** This trust is similar to an A-B trust, except that there are even more restrictions on the surviving spouse's access to the "B part" of the trust – the surviving spouse can only access interest income generated by the "B part" and not the principal (the initial investment of property in the trust), which is preserved solely for the settlor's heirs. QTIP trusts are often used when the settlor has issue from a previous marriage or relationship.
- **Generation-skipping trusts.** These trusts transfer assets to the settlor's grandchildren (rather than to the adult children) as a way to avoid certain tax liabilities that would occur if the assets were transferred to the adult children. The beneficiaries must be at least 37.5 years younger than the grantor and cannot be the grantor's spouse.

These specialized trusts are subject to complex rules that require very careful drafting. Only experienced attorneys should draft them.

Testamentary Trusts

A **testamentary trust** is one that is created by a settlor's will**.** Because it is contained in the settlor's will, it is not effective during the settlor's lifetime. Also, this type of trust does not avoid probate. Usually, they are used because the settlor wants to protect any beneficiaries under the will who might be under a certain age (determined by the settlor) when the settlor dies, or who might be disabled or incompetent. Like an *inter vivos* trust, a testamentary trust allows the settlor to appoint a trusted person as trustee to manage the trust property until the person reaches a certain age (for example, 25 years old), or fulfills a certain condition (for example, earns a college degree). Once the beneficiary reaches the required age or fulfills the condition, the trust terminates and the remaining property is distributed. The limits on the types of allowable conditions and how different conditions might be applied are discussed in a later chapter.

4.3: Basic Introduction to Wills

So far, we have discussed estate planning documents that operate during a person's lifetime. Because some people don't feel comfortable with trusts for one reason or another, it's important to also discuss the Last Will and Testament, which is the more common document that people use to distribute their property after they die.

With respect to ensuring that their property will be distributed to the people who they desire to benefit from their property, wills work essentially the same as trusts. Additionally, wills allow the client, rather than the court, to make important decisions regarding who should oversee the estate and who should be appointed as guardian/custodian for minor children and/or incompetent family members. The reasons some people prefer a will over a trust vary.

- Most people are more familiar with wills than with trusts
- Some people believe trusts are for "the rich and famous" and not for regular people with ordinary finances
- Because wills do not require an immediate transfer of ownership, they are "simpler" and less expensive to create
- Wills do not require anyone else to immediately become involved in managing property, the way a trustee of a trust must become involved
- Wills are **ambulatory**, meaning that they can be changed during the person's lifetime (similar to revocable trusts)

> **Definition: Ambulatory**
>
> **Ambulatory:** documents that can be changed during the signor's lifetime

While these are all valid reasons, when discussing estate planning with a client it is important to discuss the disadvantages of using a will vs. a trust, many of which arise primarily because a will must go through probate.

- The probate process is "public" in that the courts are involved in overseeing the administration of the decedent's estate; this also involves certain types of notices to be sent to creditors and published in the newspaper;
- As part of the probate process, certain requirements must be met and expenses paid before the decedent's beneficiaries can receive property under the will – these delays can get quite lengthy;
- A will does not provide some of the same tax-savings opportunities that a trust can provide
- Complex estates that are required to go through probate can end up costing more, overall, than creating a trust would have cost.

Even with these potential disadvantages, having a will is still preferable to dying intestate. Intestacy laws make no provisions for the desires of the decedent and leave important decisions regarding property and the needs of family members to the courts.

Wills Terminology

Before diving into the details of wills, there is some terminology with which you should become familiar:

> **Definition: Terms Relating to Wills**
>
> **Testator:** a person who creates a will. Previously, a female who created a will was known as a testatrix.
>
> **Testamentary intent:** an actual intent to make a will that distributes the person's property after they die (but not before).
>
> **Capacity:** the legal ability or power to do something,
>
> **Executor/Personal Representative:** the person or institution named by the testator to take charge of, administer, and distribute property under the will. Previously, a female who named for this purpose a will was known as an executrix.
>
> **Fiduciary:** a person appointed to serve in a position of loyalty, trust, and confidence. In the context of a trust, this person controls and manages property exclusively for the benefit of others. A fiduciary's conduct is held to the highest ethical standard.
>
> **Beneficiary:** someone receiving property or money pursuant to the terms of the will.
>
> **Contingent beneficiary:** someone who will receive property or money only if one or more conditions occur or are satisfied
>
> **Legal Title:** The form of ownership of probate property held by the personal representative, giving the personal representative the right to control and manage the property, but only for another's benefit.

Equitable Title: The form of ownership of probate property held by a beneficiary. A future right to receive full ownership of the property, and a current right to benefit from the property.

Probate: the court procedure in which a will is "proved" and the decedent's estate is collected, managed and distributed

Will Basic Requirements

Written Document

You may recall learning in a previous legal studies class that certain types of documents must be in writing to be enforceable pursuant to the statute of frauds. One memory trick for the types of documents is **MYLEGS**: **M**arital contracts; contracts in effect for at least one **Y**ear; transactions involving **L**and; transactions involving an **E**xecutor (or an **E**state); transactions involving **G**oods worth more than $500; and transactions involving a **S**urety. Wills involve an Estate, and so they are required to be in writing.

Most states also require that the will be signed by the testator. Some states require that the signature appear at the "end" of the will, though many states do not specify where the signature must be placed. The signature must be the testator's "legal" signature that the testator typically uses on other important legal documents such as checks and contracts.

Persons Involved in a Will

Four roles are created in a will: the testator, the personal representative, the beneficiary, and the witness(es). There can be multiple persons in the roles of personal representative and beneficiary; however, in most states each will must have only one testator. Unlike with trusts, because the will is only effective once the testator dies, the testator cannot name himself/herself as a personal representative or a beneficiary.

Testator

The testator must have intent to create a will and capacity to create a will. **Testamentary intent** refers to an actual intent to make a will that distributes the person's property after they die (but not before). Testamentary intent can be destroyed through fraud, coercion, or undue influence of the testator. Fraud can arise if the testator was tricked into signing a will that (1) the testator didn't realize was actually a will, but thought it was some other document; (2) contains terms that are different from the terms of a will the testator believed he/she was signing; (3) names or excludes beneficiaries based on deceptions relating to those beneficiaries' activities or predeceasing the testator. **Coercion** occurs when the testator is forced to sign a will due to physical, mental, or financial threats to himself/herself or to his/her family members. **Undue influence** involves a person taking advantage of his/her special relationship with the testator to persuade the testator to sign a will that overly benefits that person. Persons with the required type of special relationship usually include the testator's health care providers, attorneys, caregivers, ministers, or other fiduciaries. A testator who is elderly, in a physically or mentally weakened condition, terminally ill, etc. is especially susceptible to undue influence.

Capacity is the legal ability or power to do something, such as enter into a relationship or contract. Capacity typically has two components: mental competence and minimum age. **Mental competence** refers to a person's ability to understand the nature of the relationship or contract, which can be impacted by mental health conditions, alcohol or drugs. A **minimum age** for wills is determined by State law and is typically 18 or 21 years of age.

Additionally, the testator must have **testamentary capacity**, which means the testator must:

- Remember and be aware of the identities of persons who are their "natural beneficiaries" – typically family members and others with whom the testator has a special relationship or affinity
- Understand the nature, kind/type, and extent of property the testator owns and is able to distribute
- Understand how their will disposes of their property, and recognize the will as a legal document that determines how their property will be distributed after they die
- Demonstrate the ability to make a rational plan regarding the distribution of their property.

Testamentary capacity only requires a general knowledge or understanding of these things. A person who is not highly intelligent or educated, who is eccentric or peculiar, or who suffers from a mild to moderate mental health condition is not conclusively permanently lacking in testamentary capacity. Testamentary capacity can be impacted temporarily by medications, alcohol, use of recreational drugs or other psychoactive substances, mental health conditions, psychoses, delusions, or other mental illnesses. As long as the person is not severely impacted by any of these circumstances at the time the will is signed, the will can still be valid. A person influenced by substances or suffering from a mental health condition can experience temporary restoration of competence during a **lucid interval** that would allow the person to make a valid will during one of those periods. However, a person who has been officially adjudicated incompetent (usually pursuant to guardianship proceedings), is ineligible to make a will.

Personal Representative/Executor

The personal representative is the person who holds legal title to the property in the will, and who is responsible for managing the decedent's probate property. The personal representative can be a legal person (such as a trust company) or a natural person (a human being). Like the testator, the personal representative must be willing and able to act as personal representative and must have contractual capacity. Unless a trust company is named, the testator should name at least one successor personal representative to step in if the primary personal representative is unable or unwilling to fulfill the fiduciary duties of a personal representative. If a capable personal representative is not named, the court will appoint one.

The personal representative has the powers that are provided in the will and under state statute and must follow the instructions in the will. Typically, the personal representative is given broad powers similar to the rights an owner in severalty would have; the exercise of those powers is limited by the personal representative's fiduciary duty to exercise those powers solely for the benefit of the beneficiary.

Beneficiary

The beneficiary holds equitable title to the property in the will. There can be more than one beneficiary, and even more than one type of beneficiary. Beneficiaries can be natural persons, pets, charities or other organizations, or "charitable/public causes." Unlike the testator and the personal representative, beneficiaries do not need to have contractual capacity.

Beneficiaries must be sufficiently identified by name, class or specific relationship; failure to do so is fatal to the will. When naming individuals as beneficiaries, the testator should use the individual's full legal name and not just a nickname, and it is helpful to identify the person's relationship to the testator (for example, "my daughter RaeAnn Josephine Clarbots, also known as "Sunny"). When naming a class of beneficiaries, testators should be careful to describe a class that clearly includes some people while excluding others (for example, "my grandchildren"); vague descriptions such as "my family" or "my relatives" or "my friends" can also be fatal to the will.

Similarly, when naming a charity as a beneficiary it is advisable to use the charity's full legal name and supply at least the city and state where the charity is located (for example, the University of Wisconsin, located in Madison, Wisconsin). If the funds are to be used for a specific purpose, that should also be described ("for the purpose of providing scholarships to single mothers who major in the field of Political Science"). Sometimes, the identified charity ceases to exist or the stated charitable/public purpose is no longer necessary when the time comes to pay out the will funds. In that situation, the court is allowed to substitute a similar charity or charitable/public purpose under what is known as the **Cy-Pres doctrine**. For example, in In re Bletsch's Estate, 25 Wis. 2d 40, 130 N.W.2d 275 (1964), the document named as a beneficiary the "Masonic Home for Crippled Children in Illinois," a charitable organization that did not exist at the time the funds were to be paid. Instead, the court allowed payout to the Shriner's Hospital for Crippled Children in Illinois because that hospital was "an identifiable beneficiary whose charitable or public program and goals are reasonably close to those expressed" in the document.

Witnesses

The witnesses are an important component of the will and nearly all states require a will to be signed by two witnesses. Their role is to provide proof, if necessary, that the testator (who is now deceased) intended to make a will, had capacity to do so, and did so voluntarily. Thus, most states also require that the witnesses be present and actually see the testator sign the will. Witnesses must have capacity to testify in court, which again has two components: mental competence and minimum age. Mental competence refers to a person's ability to understand the nature of the relationship or contract, which can be impacted by mental health conditions, alcohol, or drugs. Minimum age is determined by State law and is typically 18 years of age. Additionally, witnesses must be **disinterested** – in other words, they should have nothing to gain by testifying either in favor of or against the will. As a result, many states limit the amount a witness can inherit pursuant to a will to what that person would have received under the state's intestacy laws if the testator had died intestate.

> **Definition: Disinterested Witness**
>
> **Disinterested Witness:** a person who has nothing to gain by testifying either in favor of or against the will.

Property Involved in a Will

Unlike a trust, a will does not require the testator to transfer existing property owned by the testator to the will. Instead, when the testator dies, it must be determined whether the testator owns property that is subject to the will and/or must go through probate. Even if property is specified as going to a particular beneficiary in the will, it is possible that the property may no longer be owned by the testator – or may no longer even exist – when the testator dies.

Modification, Revocation and "Termination" of Wills

As mentioned previously, wills can be modified or revoked during the testator's lifetime. In the past, a testator who wanted to modify only portions if his/her will used a codicil to do so. **A codicil** is a document that changes only parts of an existing will and that meets the statutory requirements for a will in terms of testamentary intent, testamentary capacity, writing, signature, and witnesses. With the advent of computers and electronic storage of documents, codicils are almost never used anymore. It is easier and faster to simply create a "new will" that contains the changes to the "old will" that would have appeared in the codicil. Making a new will also reduces the likelihood of challenges to the will later on.

Testators should be warned against attempting to change their wills through **interlineation**, which involves crossing out items or writing new terms or information between the lines or on other places in the will. Most states will not enforce these "new" terms, and many will declare the entire will invalid.

Definition: Terms Related to Modification of Wills

Codicil: a document that changes only parts of an existing will and that meets the statutory requirements for a will in terms of testamentary intent, testamentary capacity, writing, signature, and witnesses.

Interlineation: crossing out items or writing new terms or information between the lines or on other places in the will.

A testator may also decide to revoke the entire will, with or without creating a new will. Before the testator dies, the will can be revoked by the testator in the following ways:

- **Revocation by subsequent writing.** The testator can create a new will – or a trust – that expressly is intended to replace the existing will.
- **Revocation by physical act.** The testator burns, tears up, or otherwise intentionally destroys the existing will.
- **Revocation by operation of law.** In some states, an existing will is revoked in whole or in part if the testator was married when the will was signed and subsequently divorces. Similarly, in some states, an existing will is revoked if the testator was unmarried when the will was signed and subsequently marries.
  - **Impact of divorce in Wisconsin.** A divorce automatically revokes all provisions in an existing will granting any rights, authority, or gifts to the former spouse as well as the former spouse's relatives, including any individual related to the former spouse by blood, adoption, or marriage.
  - **Impact of marriage in Wisconsin.** Generally, if a person marries after making a will, the surviving spouse will be entitled to an elective/forced share (see Chapter 3.3). This impact can be avoided if the will expressly states an intent that it not be revoked by a subsequent marriage or if the surviving spouse waives this right in a properly signed marital contract.

After the testator dies, a will "terminates" once all of the property subject to the will has been distributed according to the will's terms and the testator's probate estate has been closed.

Types of Wills

In addition to "traditional" wills, some states allow special types of wills under certain circumstances that do not require the will to meet all of the basic requirements described above.

A **Holographic/Olographic Will** is one written entirely in the testator's own handwriting**.** Many states do not require these wills to be witnessed nor to be dated by the testator. Florida, Missouri, Ohio, Oregon, and Vermont prohibit these types of wills. Some states, such as Maryland, New York, and Rhode Island only allow these wills to be made by testators actively in the armed services and/or during armed conflict. Still other states allow handwritten wills, but still require witnesses; Wisconsin is one of those states.

A **Nuncupative Will** is not written at all; instead, it is orally spoken in the presence of witnesses and is valid only in exceptional circumstances (usually the imminent death of the testator)**.** Most states do not allow nuncupative wills (including Wisconsin).

States that do allow them have strict deadlines for probating them and may restrict the amount or type of property that can pass under them.

A handful of states, including Wisconsin, provide a **statutory will form**, which is a fill-in-the-blank form created by the state that meets all of the state's requirements for a valid will**.** These wills are simple and do not allow for much customization by the testator.

4.4: Basic Introduction to Conditional Gifts

So far, we have talked about many documents through which a person can give a gift to another. There are also two types of gifts that can be given, either during one's life or after death: irrevocable gifts or revocable/conditional gifts.

Definition: Terms Related to Gifts

Irrevocable: Gifts that are not capable of being altered, canceled, rescinded, or recalled.

Revocable: Gifts that are able to be altered, canceled, rescinded, or recalled.

Donor/giver: the person giving the gift

Donee/recipient: the person receiving the gift

Whether a gift is irrevocable or revocable depends on the circumstances surrounding the giving of the gift.

Irrevocable Gifts

For a gift to be **irrevocable**, there must be a voluntary delivery of something from one person to another. The **giver** (also known as a **donor**) must intend, at the time the item is delivered to the other person, to immediately transfer title, ownership, and control of the item to the **recipient** (also known as a **donee**). There must be no payment or other consideration provided by the recipient to the giver in exchange for the item, and the recipient must accept the gift. A statement of intent to give a gift in the future, or only if certain circumstances occur, is not an irrevocable gift. Loaning something to someone with the expectation that it will be returned also is not an irrevocable gift.

Figure 4.4.1: Gift Requirements

To make an effective gift inter vivos or causa mortis, the law imposes three requirements: (1) the donor must *deliver* a deed or object to the donee; (2) the donor must actually *intend* to make a gift, and (3) the donee must *accept* (see Figure 4.4.1).

Delivery

Although it is firmly established that the object be delivered, it is not so clear what constitutes delivery. On the face of it, the requirement seems to be that the object must be transferred to the donee's possession. Suppose your friend tells you he is making a gift to you of certain books that are lying in a locked trunk. If he actually gives you the trunk so that you can carry it away, a gift has been made. Suppose, however, that he had merely given you the key, so that you could come back the next day with your car. If this were the sole key, the courts would probably construe the transfer of the key as possession of the trunk. Suppose, instead, that the books were in a bank vault and the friend made out a legal document giving both you and him the power to take from the bank vault. This would not be a valid gift, since he retained power over the goods.

Intent

The intent to make a gift must be an intent to give the property at the present time, not later. For example, suppose a person has her savings account passbook put in her name and a friend's name, intending that on her death the friend will be able to draw out whatever money is left. She has not made a gift, because she did not intend to give the money when she changed the passbook. The intent requirement can sometimes be sidestepped if legal title to the object is actually transferred, postponing to the donee only the use or enjoyment of the property until later. Had the passbook been made out in the name of the donee only and delivered to a third party to hold until the death of the donor, then a valid gift may have been made. Although it is sometimes difficult to discern this distinction in practice, a more accurate statement of the rule of intent is this: Intention to give in the future does not constitute the requisite intent, whereas present gifts of future interests will be upheld.

Acceptance

In the usual case, the rule requiring acceptance poses no difficulties. A friend hands you a new book and says, “I would like you to have this.” Your taking the book and saying “thank-you” is enough to constitute your acceptance. But suppose that the friend had given you property without your knowing it. For example, a secret admirer puts her stock certificates jointly in your name and hers without telling you. Later, you marry someone else, and she asks you to transfer the certificates back to her name. This is the first time you have heard of the transaction. Has a gift been made? The usual answer is that even though you had not accepted the stock when the name change was made, the transaction was a gift that took effect immediately, subject to your right to repudiate when you find out about it. If you do not reject the gift, you have joint rights in the stock. But if you expressly refuse to accept a gift or indicate in some manner that you might not have accepted it, then the gift is not effective. For example, suppose you are running for office. A lobbyist whom you despise gives you a donation. If you refuse the money, no gift has been made.

Gifts Made in Contemplation of Death

Even though the requirements of delivery, intent, and acceptance apply to gifts in contemplation of death as well as *inter vivos*, a gift made in contemplation of death may be distinguished from a gift *inter vivos* on other grounds. The difference between the two lies in the power of the donor to revoke the gift before he dies; in other words, the gift is conditional on his death. Since the law does not permit gifts that take place in the future contingent on some happening, how can it be that a gift made in contemplation of death is effective? The answer lies in the nature of the transfer: the donee takes actual title when the gift is made; should the donor not in fact die or should he revoke the gift before he dies, then and only then will the donee lose title. The difference is subtle and amounts to the difference between saying “If I die, the watch is yours” and “The watch is yours, unless I survive.” In the former case, known as a condition precedent, there is no valid gift; in the latter case, known as a condition subsequent, the gift is valid.

Revocable/Conditional Gifts

Revocable gifts are also sometimes called **conditional** gifts. The gift is not complete unless or until something occurs (or does not occur) in the future. Sometimes, clients are concerned about how their beneficiaries will use money or property given to them after the client dies. Conditional gifts may allow the client to require or disincentivize specific actions before a beneficiary receives all or a portion of their inheritance. There are two types of conditional gifts: conditions precedent and conditions subsequent.

A **condition precedent** is an action or a specific event that must occur before an agreement, obligation, or gift becomes complete and binding. This means that the beneficiary first must meet a specific requirement to become entitled to receive the gift. In the context of estate planning, some typical conditions precedent include:

- Reaching a certain age
- Obtaining a college degree or some other credential, or obtaining full-time work (sometimes in a specified field)
- Agreeing to carry on the family business
- Marrying someone or having a child
- Engaging in a favorable behavior
- Ceasing a detrimental behavior
- Passage of a certain number of years or specified intervals of time

Definition: Condition Precedent

Condition precedent: an action or a specific event that must occur before an agreement, obligation, or gift becomes complete and binding.

Example: Conditions Precedent

- Giving a named beneficiary a sum of money or an item of property when
  - She reaches 25 years of age.
  - He receives his college degree
  - She moves back to Wisconsin to live and takes over running the family farm
  - He completes a sobriety program and remains sober for five years
  - She marries a man who has a law degree or a paralegal degree

- Ten years have passed after the date of my death
- Giving an item of property to “the person taking care of me at death.”
- Giving a named beneficiary “the automobile owned by me at the time of my death.”
- Giving a named beneficiary “$5,000 every 3 years after the date of my death.”

A **condition subsequent** is an action or a specific event that, if it occurs or if it does not continue to occur, will terminate an agreement, obligation, or gift. This means that the beneficiary will continue to receive the benefit of a gift unless and until a specific requirement exists or a continuing requirement is no longer being met. In the context of estate planning, some typical conditions subsequent include:

- Failing to obtain a college degree or some other credential, or obtaining full-time work (sometimes in a specified field) by a certain deadline (or within a specified timeframe)
- Getting out of the family business
- Marrying someone of a specified “undesired” characteristic (for example, someone of a different faith), or before reaching a certain age, or having a child out of wedlock
- Engaging in a detrimental behavior

Definition: Condition Subsequent

Condition subsequent: an action or a specific event that, if it occurs or if it does not continue to occur, will terminate an agreement, obligation, or gift.

Example: Conditions Subsequent

- Giving a named beneficiary a sum of money or an item of property as long as
  - He does not marry before she reaches 25 years of age.
  - She does not engage in underage alcohol consumption, recreational drug use, or gambling
  - He passes monthly drug tests
  - She moves back to Wisconsin to live and takes over running the family farm
  - He completes a sobriety program and remains sober for five years
  - She marries a man who has a law degree or a paralegal degree
  - Ten years have passed after the date of my death
- Giving a named beneficiary a sum of money or an item of property unless
  - She marries someone of a non-Christian religious faith
  - He does not obtain a college degree by the time he reaches 30 years of age
  - She does not move back to Wisconsin to live “within 5 years after the date of my death”

Conditions must be clear, reasonably attainable by the beneficiary, and not otherwise against public policy; otherwise, courts might not enforce them. For example, courts will not enforce conditions that use unclear or vague language (for example, a condition that requires a beneficiary to “stay away from bars and other places of ill repute.”) Similarly, a court might refuse to enforce a condition that the beneficiary will be unable to meet through no fault of his/her own (for example, a condition that requires a beneficiary to become a firefighter, and the beneficiary lost a limb in an accident caused by someone else). Finally, courts will not enforce conditions that are unconstitutional, or that encourage behavior that is illegal, immoral, or “detrimental to the public welfare” (for example, a condition that requires a beneficiary not to marry someone of a specified race or a condition that provides an incentive to a beneficiary to divorce his/her spouse).

Conditions can, however, be quite restrictive or seem “unfair” when they are applied. Here are some examples of such conditions that were enforced. (Nolo.com, Conditional Gifts Wills Trusts”)

While it is understandable that some clients may wish to incentivize or disincentivize certain behaviors of their beneficiaries, conditions can cause ill will and may not be as effective as the client hopes. Additionally, litigating challenges to conditions can be costly and very time-consuming.

4.5: Basic Introduction to Specialized Estate Planning Documents

The previous sections cover the estate planning documents most typically used in a comprehensive estate plan. Sometimes, however, clients' specific wishes or the types of assets they own require additional documents to complete their estate plans. This chapter will introduce concepts relating to digital estate planning and a letter of last instructions.

Digital Estate Planning

An ever-growing number of people own digital assets and/or participate in websites, blogs, and social media. Any content stored in digital format can be considered a digital asset. You likely have digital assets on your computer, cell phone, and external hard drives. Examples of digital assets include:

- Online banking accounts
- Social media accounts
- Blogs and domain names
- Email accounts
- Cloud storage accounts
- Online store and shopping accounts
- Subscription service accounts
- Utility accounts
- Gaming accounts
- Cryptocurrency and NFTs (Findlaw.com, What Is Digital Estate Planning?)

Typically, you set up a username and password when creating an online service account. Companies that administer such accounts tend to have policies and agreements you agree to when you open an account. For example, some online service providers only allow the account owner to access the online services. While this can help prevent unauthorized use of your digital accounts, it could also be a barrier for your family if they attempt to access your digital accounts when you die.

If your family members seek to access your digital accounts when you die, the online service providers may deny them the login information they need. After a certain period, the online service providers may deactivate or delete the accounts. Your family may lose access to your digital property if this happens, digital estate planning allows you to make it easier for your family to access the digital property that they need.

Nearly every state has enacted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which allows personal representatives to access the digital property of the deceased. Under the Act, a person granted authority in a will to handle the deceased's property may be allowed to access certain digital assets.

However, the Act restricts access to electronic communications such as emails and social media accounts. Your executor may only be able to gain access to files directly related to wrapping up your estate. The rest of your digital life would have to be managed piecemeal by your loved ones or live on until the domains expire or close. (Findlaw.com, What Is Digital Estate Planning?)

Information regarding digital assets should not be included in a Will; instead, they should be part of a separate Letter of Instruction (see below). Some instructions to include:

- **Email Accounts.** The company that runs your email account, whether this is a personal email or a work email, will delete your account eventually after your death. If you want to preserve certain emails or files attached to emails, you can provide instructions to archive or print these items before your account is deleted. You can also ask your executor to delete certain emails to protect your privacy if you would prefer that your family and friends never see them.
- **Social Media.** Facebook, Twitter, and other social networks have certain procedures that they follow when a member dies. Often, the account is deleted or deactivated, although Facebook will leave an account open for viewing and give people an opportunity to leave memorial messages. You can ask your executor to post a status update or message on your account about your death, or you can have them go through it to delete certain posts that you do not want others to see. If you would prefer to have an account deleted promptly, or not have it remain in "memorial status," you can tell your executor to delete it.
- **Websites and Blogs.** If you own a website, you can ask your executor to transfer the license to someone else, or they can keep paying for the license to keep the domain online and accessible. Alternatively, you can ask your executor to end the license so that your estate does not need to keep up with payments. If you contribute to a blog, your executor can post on the blog about your death so that your readers are aware. They can also take the blog offline or archive its posts. If you contribute to a forum or

another site to which many people contribute, you can ask your executor to let the site administrators know about your death and share any final message with them.
- **Online Selling Accounts.** Many people have opened accounts on websites such as Amazon or eBay to sell items to individual buyers. You can provide in your will that any items that are currently for sale when you die will be left to your heirs, and they should be able to receive profits from sales. Whether your account can be transferred to someone else will depend on the policy of the specific company. A family member can always make a new account to sell the items.
- **Online Storage.** If you choose to give your executor access to photos, music, or other files online, you will want to give them instructions about how to reach and download the files. You can leave the contents of the files to your loved ones in your will. On the other hand, if you do not choose to provide access to online storage, the company that runs the account will disable it, and nobody will be able to access the files.
- **Online Access to Financial Accounts.** While you should leave the contents of your financial accounts to your loved ones in your estate plan, you will need to give your executor access to the online accounts that control your finances. They will need log-ins, passwords, and other identifying information to keep up with payments on behalf of your estate. These accounts may include your mortgage, utilities, bank accounts, retirement accounts, and life insurance, among others. Even if you do not give your executor your log-in information, they may be able to get access to your accounts under state law. This process will be more challenging if you do not provide authorization and instructions, though. (Justia.com, Planning Your Digital Legacy)

If you want to make sure that you have accounted for all of your digital property in your digital estate plan, start the process by making a list of all your digital assets. Remember your most common types of digital assets, such as social media accounts and email accounts. To help your loved ones access your online records and accounts, you should provide the usernames and passwords to the accounts. The easiest way to organize your account information is by using a password manager, but you can also list this information in a word processor. Password managers can store other sensitive data, like credit card information, PINs, access keys, and digital copies of documents like your birth certificate and Social Security card. Some digital asset organizers allow you to name an emergency contact. Remember to review this list periodically and update it if your login information changes. (Findlaw.com, What Is Digital Estate Planning?)

Cryptocurrency (like Bitcoin and Ethereum) and NFTs require special attention. Because cryptocurrency is decentralized, there is no organization to contact if you want to access a digital wallet or its contents. For your loved ones to access your digital wallet, you need to give them your unique identifier and password for each wallet you have. However, because this is highly sensitive information, you should leave it in a secure place, such as a safe deposit box, and not written out in your will. You can also store your cryptocurrency and NFTs in a revocable trust, keeping it out of probate and adding an extra layer of privacy.

As you think about how you want your digital assets managed upon your death, do not forget to check how the service provider's policies, user agreements, and custodial tools play a part in what happens to your digital estate when you are gone. Look for this information before leaving instructions on handling your digital assets. Some online assets, such as audiobooks, music, or movies, can't transfer based on the terms you agreed to when you opened the account.

Many companies have legacy policies that deal with what happens to your online account when you die. Other companies offer custodial tools that allow you to authorize someone to access your digital account when you die.

If you have accounts that generate income, decide whether you want someone else to continue to run the account or close it. If you have a blog or other online presence, would you like the blog to remain up, or would you like it removed upon your death? You may want someone to make a final post to your followers (written by you or your appointee). Indicate what you would like to happen with each account, and then decide who you want responsible for carrying out your wishes. (Findlaw.com, What Is Digital Estate Planning?)

Letter of Last Instructions

In addition to providing information about their digital assets, "[m]any people may want to make [other] comments about the disposition of their affairs that do not belong in the will itself. These comments can be put in an informal letter of last instructions to the family. The letter may contain personal thoughts about a person's life or family." (University of Wisconsin-Madison Extension, Family Estate Planning in Wisconsin (B1442).

Family adjustment may be easier if the letter of last instructions includes information survivors need to know in order to take over the decedent's affairs. List the names, addresses, and phone numbers of people who should be notified upon death. State where to find personal papers, will, and birth and marriage certificates. List the numbers and locations of bank accounts and insurance policies.

If you have family pets, indicate how you want them cared for and who should receive them. Discuss this with the recipients to be sure they are willing and know where you keep veterinary records.

Other topics to include in your letter of last instructions:

- Personal information
  - Full legal name, nicknames, aliases, and former names
  - Current home address and addresses for other current or previous residences
  - Telephone number
  - Social Security number
  - Date(s) of marriages and/or divorces
  - Employment history
  - Military record
- Family information
  - Names and contact information for all current family members, including spouses, children, grandchildren, etc.
  - Marital status of family members
- Fiduciaries
  - Name and contact information for personal representatives and/or trustees, including successors
  - Name and contact information for nominated guardians
- Professional advisors
  - Name and contact information for accountants and/or tax advisors
  - Name and contact information for financial planners/stockbrokers
  - Name and contact information for insurance agents/brokers
  - Name and contact information for real estate agents/brokers
  - Name and contact information for attorneys
- Names of health care providers (for final billing)
- Financial Information
  - Banking institutions, including account numbers for checking accounts, savings accounts, and certificates of deposit
  - Mutual fund and other investment information, including account numbers
  - Information relating to retirement accounts and pensions
  - Life insurance companies, including policy numbers
- Locations of important documents
  - Wills and trusts
  - Baptismal, certificates
  - Marriage and divorce certificates
  - Social Security card
  - Tribal enrollment number and certificate of Indian blood degree
  - Naturalization and citizenship papers
  - Membership certificates in societies or organizations
  - Safe deposit box and keys
  - Pension plans and employment benefit documents
- Credit card information, including account numbers
- Loan information
- Vehicle information including make, model, and VIN number
- Names of individuals or companies providing services, such as lawn care, streaming services, etc.
- Pledges to charities
- Funeral and burial or cremation instructions and releases for donation of organs or body.
- Instructions regarding business interests.

A Letter of Last Instructions is not binding and is not a will/trust substitute. Because it is not a legal document, it may be changed at any time without witnesses. In some states, including Wisconsin, a Letter of Last Instructions (which may also include a Memorandum of Gifts) is not binding unless (1) it is signed and dated by the testator; (2) the testator's will specifically and expressly refers to this separate document; (3) it describes property, gifts, and beneficiaries with reasonable certainty; and (4) property to be distributed is limited to tangible personal property (intangible personal property such as cash, bank accounts, stocks and bonds, and real property are excluded).

Where Should Estate Planning Documents be Stored?

Of course, none of these documents is useful if the clients' survivors have no idea where to find them or are unable to access them. Clients should be advised to carefully consider where to store these documents. A safe deposit box is generally not a good place to store these documents, because the safety deposit box might be sealed upon the client's death. Additionally, many lawyers are no longer willing to keep original estate planning documents. Thus, clients should be advised to invest in a fireproof storage container with a key; they should also inform persons whom they nominate as powers of attorney or personal representatives as to the location of these storage containers, as well as provide them with a copy of the key.

Paralegal Roles

When a client comes to the law office requesting an estate plan, the paralegal’s role is to support the supervising attorney in providing legal services and act as liaison between the client and the supervising attorney. Typical tasks include interviewing the client, requesting documents and other information from the client, and drafting documents as directed by the supervising attorney. Once the documents have been drafted, the paralegal provides them to the client for the client’s review and approval. The paralegal also plays a critical role in making sure estate planning documents are properly executed, as well as providing the client with recommendations regarding maintaining, keeping, and updating estate planning documents.

CHAPTER OVERVIEW

5: Wills

5.1: Basic Introduction to Drafting Wills

Now that you know the basic requirements for a valid will, it's time to move on to the actual drafting of wills. Careful and accurate drafting is crucial because wills do not become effective – and generally are not read – until after the testator dies. As such, the will is the only court-admissible document establishing the testator's intent regarding his/her property; therefore, the will must be clear and unambiguous. This chapter will explore general guidelines for drafting wills as well as explanations of required will provisions.

General Will-Drafting Guidelines

The main goal when drafting a client's will is to ensure the document expresses the client's intent accurately, clearly, and unambiguously; a secondary – and no less important – goal is to minimize the possibility of successful challenges to the will after the testator dies (these are known as **will contests**).

> **Definition: Will Contest**
>
> **Will contest:** A court action challenging the validity of a will, or the appointment of a nominated personal representative.

Following these guidelines when drafting a will helps to achieve these goals.

- **Do not use pre-printed will forms.** Even though many states (including Wisconsin) have statutory will forms, they should be avoided. As mentioned in a previous chapter, they do not provide much opportunity for customization to reflect the client's wishes. Also, having clients insert handwritten information into these forms can raise the specter of interlineation, which can invalidate the whole will.
- **Be wary of mass-produced will forms available on the Internet or through websites offering generalized legal services.** Even the most reputable websites cannot guarantee that the will meets the requirements of the state in which the testator is domiciled with respect to content nor with respect to execution (completing and signing). Many of these websites recommend consulting an attorney before using their forms; that being the case, it's better to just consult an attorney at the outset.
- **Use the same font type, style, color, and size throughout the entire will.** With word-processing programs making it easy to substitute pages after the will is signed, changing font type, style, color, etc., can raise suspicion that the original will has been fraudulently modified.
- **Be mindful of page breaks and empty spaces in the will.** Margins should be set at no more than one inch all around; some lawyers recommend even smaller margins, such as half an inch. This reduces the possibility of adding words or provisions to a page that is inserted after the will is signed. For similar reasons, many lawyers when drafting wills do not follow the "widows and orphans" conventions used in most other documents. If a paragraph or provision flows onto the next page, it can be more difficult to change that provision on a substituted page.
- **Make sure each page is numbered consistently.** Many wills have page numbers centered at the bottom of the page, often in a footer, using language such as "Page 1 of 12." While not completely foolproof, it makes it harder to substitute pages after the will is signed. For this reason, many lawyers also have the testator sign or initial each page of the will.
- **Do not put the testator's signature, nor the witnesses' signatures, as the only item on a page.** Include some substantive provisions. Additionally, many lawyers recommend against typing in the date of signature for the testator and witnesses, requiring them to be handwritten at the time of signing, as another means to make it more difficult to substitute pages after the will is signed.
- **Use full legal names and relationships for all persons and entities named in the will.** For the testator, personal representatives, trustees, beneficiaries, and guardians, use their full legal first, middle, and last names; include common nicknames where applicable (for example, William Berkely Devonshire, also known as "Tippy"). Be specific as to relationships (grandchild, stepbrother, friend) especially if there are multiple people in the testator's family with the same name to differentiate among these persons. For example, if the testator's two brothers both marry women with the same first and middle name (so both are named Mary Ellen Carpiaux), including the relationship between the intended beneficiary and the testator removes the ambiguity (to Mary Ellen Carpiaux who is married to my brother Thomas James Carpiaux" rather than "to my sister-in-law Mary Ellen Carpiaux" which leaves us to guess which sister-in-law is intended). For charitable organizations or other organizations/businesses named in the will, using the full legal name of the organization (and not a trade name) and including the address of the organization helps to alleviate any potential for ambiguity.
- **Choose will language carefully.** Words that are direct, concrete, and simple are best. To that end,

- Avoid using **precatory words** (hope, desire, ask, request, wish, etc.); they are soft, ambiguous, and "wishy-washy." Instead, use words like "I give" or "shall receive" or "shall not receive."
- Avoid using legalese such as bequest/bequeath, devise, legacy, etc. This makes the will easier to understand by the testator's family and others who need to implement the will's terms.
- Carefully check the entire will for internal inconsistencies. This typically happens when specific gifts are made in one part of the will (for example, "I give my art collection to my son") and a later clause appears to dispose of a class or type of property that appears to include that specific gift (for example "I give all of my personal property to my daughter"). While it's important to have such clauses (sometimes known as "everything else" or "kitchen sink" clauses) to avoid leaving property outside of the will (making it intestate property), it's critical that such clauses don't conflict with other clauses in the will providing for other gifts of property. Simply adding the phrase "not otherwise disposed of under other provisions in this will" can help correct this potential ambiguity.
- When describing classes of personal property, be careful about the location of the personal property as part of the description, especially if the testator owns multiple buildings or other real property assets (for example, "I give all of the antiques located in my barn to my brother."). If the testator moves the property during his/her lifetime, the will may no longer accurately reflect the testator's intent as to who should receive it. Sadly, there have also been many instances of persons improperly moving personal property after the testator has died to prevent another person from receiving the property.
- If a gift is to be conditional (tied to the occurrence or non-occurrence of an event or circumstance), using clear and direct language is critical. Conditional gifts were discussed in Chapter 4.5.

> **Definition: Precatory Words**
>
> **Precatory words:** Words that are soft, ambiguous, and "wishy-washy" rather than directives. Examples include hope, desire, ask, request, wish, etc.

Following these guidelines, in addition to consulting with the client frequently regarding the client's intent regarding his/her property and beneficiaries, will go a long way toward avoiding the potential that the testator's true intent will not be implemented.

Standard Will Contents

Although each state has unique requirements for valid wills, there are requirements that are common to nearly all states. The following standard provisions and clauses are designed to demonstrate that the will meets those requirements, and also ensure that the will is complete.

Exordium/Publication Clause.

This clause, which begins the will, has several purposes: (1) identify the testator; (2) confirm the testator's domicile at the time the will is signed; (3) express testamentary intent; (4) establish testamentary capacity; and (5) fulfill statutory "publication" requirements. As mentioned previously, the testator's full legal name (first, middle, last) should be included, as well as any other names by which the testator is commonly known. Remember, **domicile** (the place where a person intends to make their legal, permanent home) is important because the rules of the testator's state of domicile determine the requirements for the will's validity (how domicile is determined is discussed in a later chapter). As you read in Chapter 4.3, actual intent to make a will (testamentary intent) and the legal ability to make a will (testamentary capacity) are necessary requirements for a valid will. Some state statutes also require the testator to "publish" the will, meaning to make it generally known that the testator intends the document to be the testator's last will and testament.

General Revocation Clause

This clause is typically included at the end of the exordium/publication clause. Its purpose is to state the testator's clear intent to revoke any and all prior wills previously signed by the testator.

> **Example: Exordium/Publication Clause with General Revocation Clause**
>
> I, Prince Rogers Nelson, a/k/a (also known as) Prince, a/k/a, the Artist Formerly Known as Prince, a/ka The Artist, residing at 7801 Audubon Road, City of Chanhassen, County of Carver, State of Minnesota, being of sound and disposing mind and

memory, and not acting under undue influence of any person whomsoever, make, publish and declare this document to be my last will and testament. I hereby expressly revoke any prior wills and codicils made by me.

Debt Payment Clause

Most wills include a clause directing the personal representative to use the residuary of the estate for payments of the testator's debts, expenses related to the testator's last illness, funeral and burial expenses, costs and expenses of estate administration (probate), and estate/inheritance taxes. The purpose of this clause is to avoid abatement (See Chapter 3.2) of other gifts in the will.

Nomination of Personal Representative

As mentioned in Chapter 4.3, the Personal Representative is responsible for administering and distributing the testator's estate after the testator dies. This person should be identified by full legal name (first, middle, last) and a description of the person's relationship to the testator; it may also be helpful to include other names by which this person is commonly known. At least one successor Personal Representative should be nominated in case the person nominated as primary Personal Representative is unable or unwilling to act as Personal Representative. In most states, persons who are non-citizens, convicted felons, mentally incompetent, or minors cannot act as Personal Representatives. It would also be a conflict of interest for the will to nominate the drafting attorney or paralegal as the Personal Representative.

Some wills also include a section listing the powers of the Personal Representative granted in the will; if this section is not included, the Personal Representative has the powers provided in the statutes of the state in which the testator was domiciled at death. If the testator desires that the Personal Representative be allowed to serve without paying a bond, that statement should be included in the nomination paragraph(s).

Specific, Demonstrative, and General Gifts to Beneficiaries

These different types of gifts (see Chapter 3.2), should be listed in this order to avoid ambiguity or internal conflicts: (1) specific gifts, (2) demonstrative gifts, (3) general gifts. As with the Personal Representative, beneficiaries should be identified by full legal name (first, middle, last) and a description of the person's relationship to the testator; it may also be helpful to include other names by which this person is commonly known. To avoid issues that could arise if a beneficiary predeceases the testator or dies shortly after the testator, many wills also condition the gift on the beneficiary surviving the testator and not dying within a certain number of days after the testator. It is also best to identify who would receive the gifts as successor beneficiary in the event the primary beneficiary dies too soon (or declines the gift), especially if the testator wants the gift to go to someone other than the primary beneficiary's heirs. The gift being given should be described as specifically as possible. For motor vehicles, this would include make, model, year, and VIN number. For financial and investment accounts, the name of the financial institution/fund administrator should be included, along with the account number. Gifts of real property should include an address or other information specifically and uniquely identifying the property.

With respect to gifts of real property, it is best to have a separate paragraph for each. The testator should specify whether the real property itself is to be given to the beneficiary(ies) or if it is to be sold and the sale proceeds given to the beneficiary.

✔ Example: Specific Gift Provision

I give my sister Tyka Evene Nelson, if she survives me and does not die within 120 days of my death, my home located at 7801 Audubon Road, City of Chanhassen, County of Carver, State of Minnesota (also known as Paisley Park). If my sister Tyka Evene Nelson does not survive me, I give Paisley Park to Graceland Holdings, 3764 Elvis Presley Boulevard, Memphis, Tennessee, to hold open and operate as a public museum for the purpose of displaying my personal archives.

Residuary Clause

The purpose of the residuary clause is to avoid the problem of any property not specifically described in the will, or acquired after the will is signed, being classified as intestate property. The residuary clause gives any such property to the testator's beneficiaries identified in the clause. Great care must be taken to avoid conflicts between a broad residuary clause and gifts previously made in the will.

Example: Residuary Clause Excerpt

I give all of my residuary Estate, remaining after the distribution of gifts and payment of the amounts provided above, to my friend, Sinéad O'Connor, a/k/a Sinéad Marie Bernadette O'Connor, if she survives me and does not die within 120 days of my death. My residuary Estate shall consist of all property of whatever kind and wherever situated in which I may have an interest at my death which is not otherwise effectively disposed of by this Will...

Testimonium Clause

This clause appears directly above the date and testator's signature near the end of the will. Its purpose is to establish that the testator signed the will voluntarily and with full knowledge of its contents. This clause also typically states that the testator requested the witnesses to sign the will.

Example: Testimonium Clause

I freely and willingly subscribe my name to this will consisting of [number of pages in the will] pages on this ___ day of [month], [year], at Minneapolis, County of Hennepin, State of Minnesota, in the presence of these witnesses; … each of whom I have requested to subscribe their names in my presence and in the presence of each other.

Attestation Clause

This clause appears directly above the witnesses' signatures at the end of the will (and after the testator's signature). Its purpose is to describe in detail what the witnesses have witnessed – that the testator had testamentary intent and capacity, expressed intent that the document was to be the testator's last will and testament ("publication"), and that the testator signed the will knowingly, voluntarily, and without duress or undue influence.

Example: Attestation Clause

On the date shown above, Prince Rogers Nelson, known to us to be the person whose signature appears at the end of this will, declared to us, the undersigned, that the forgoing instrument was his will. He then signed the will in our presence. At his request, we now sign our names in his presence and in the presence of each other as attesting witnesses, on the day, month, and year last above written. We further certify that, in our opinion, on the date hereof Prince Rogers Nelson was of sound and disposing mind and memory and not acting under fear, duress or undue influence.

Depending on the needs, intent, and desires of the testator, additional provisions and clauses will need to be included in the will.

5.2: Basic Introduction to Executing Wills

Properly signing (or executing) wills is just as important as carefully drafting them. After the testator dies, having competent witnesses who can testify that proper procedures were followed to ensure the will's validity is crucial to defending against a potential will contest. This chapter will explore general guidelines for executing wills as well as considerations for keeping the will in a safe, yet accessible, location.

Procedure for Signing Wills

If there is a challenge to the will's validity, the persons who witnessed its execution may be called upon to testify regarding the testator's identify, signature, testamentary intent, and/or capacity; the absence of fraud, duress, or undue influence; or whether the will being presented for probate is a forgery or has been altered. Thus, the signing of the will needs to include questions, statements, and circumstances demonstrating each of these things. Each attorney will have his/her preferred process, which typically involves the following steps:

1. **Provide the testator with the final draft and ask him/her to read it in its entirety.** Some attorneys do this ahead of time and meet with the client before bringing the witnesses into the room in case the client has questions about the will or wants to make last-minute changes.
2. **Bring the witnesses into the room with the testator and take steps to establish capacity.** If the testator and witnesses don't know each other well, make introductions and explain the purpose of the witnesses' attendance. Make small talk about current events, the weather, etc., to show the testator is "oriented times 4" (fully alert and aware of who they are, where they are, date/time, and what is happening)
3. **In the presence of the witnesses, ask the testator if he/she:**
    - **Has read the entire will**
    - **Understands the entire will**
    - **Feels that the will correctly and accurately reflects his/her wishes**
    - **Intends to sign the document as his/her last will and testament** (and, if applicable, intends to revoke prior wills and codicils)
    - **Is signing the will voluntarily.** Ask the testator whether he/she is feeling threatened, pressured, or influenced by anyone or any circumstances to sign the will.
4. **Direct the testator to date and sign the will; make sure the witnesses are actually able to see this taking place**. Some attorneys also have the testator sign or initial each page of the will, making sure this is done in the same place and in the same manner on each page.
    - **If the testator is physically unable to sign, ask the testator whether he/she would like to direct someone to sign his/her name to the will.** Have the testator then expressly ask a specific individual (other than one of the witnesses) to do so.
    - **If appropriate, ask the testator if he/she would like someone to assist him/her in physically signing his/her name.** This could take the form of guiding the testator's hand or helping the testator hold his/her hand steady.
5. **Ask the testator whether he/she would like the witnesses to sign the will.**
6. **Direct the witnesses to sign the will; make sure they see each other sign the will, and that the testator sees both witnesses sign the will.**
7. **If a self-proving affidavit is being used (see below), repeat steps 1-3, above.** Make sure everyone has read and understands the affidavit and confirms that the statements it contains are true and accurate.
8. **Place each party under oath and ask each to sign the affidavit.** A notary should perform this step; typically, the paralegal is a certified notary public and is able to notarize documents.

Although making copies of the will and the self-proving affidavit is advisable, only the original should be signed – do not have the testator and/or witnesses sign the copies. After all the documents are signed, it is a good idea to ask the testator and each witness to write a memo or note to themselves about what they did, saw, and heard. The memo or note should be kept in a safe and accessible place so that it can be used as a reminder if testimony becomes necessary.

Partly as a result of the COVID shutdowns, some states, including Wisconsin, enacted statutes detailing the procedure for virtual/remote signing of wills. These steps must be followed completely and accurately, and great care should be taken to document this, through use of a memorandum or a checklist (See Wis. Stat. Section 853.03(2)(c)).

Avoiding Will Contests

Despite painstaking efforts to properly draft and execute wills, beneficiaries and heirs are sometimes unhappy with the testator's intent as expressed in the will. Some dissatisfied persons elect to challenge the validity of the will in a court proceeding known as a **will contest.** Will contests involve evidentiary hearings in front of a probate judge presenting witness testimony and documentary evidence, similar to what would happen in a civil trial. Will contests not only cause stress and delay in the probate process, but they are also quite costly. Thus, testators who anticipate these issues sometimes request measures be taken to create disincentives against filing will contests. The two most common methods are *in terrorem* clauses and self-proving wills/affidavits.

In Terrorem Clause

This is a clause included in the will that penalizes anyone who attempts to contest or challenge the will or any of its provisions. Typically, these clauses state that a person who contests the will forfeits any gifts or other benefits they would have received under the will. Some states refuse to enforce such provisions. Other states, including Wisconsin, refuse to enforce such provisions if the person filing the will contest had "probable cause" to support the will contest, even if the person is ultimately unsuccessful. Probable cause is a very low burden of proof requiring only that there be reasonable grounds for believing something is true, or that there is more evidence showing something is true than there is evidence showing something is false -- this is an even lower standard of proof than preponderance of the evidence.

Self-Proving Wills/Affidavits

Nearly every state provides an option for including an affidavit signed by the testator and witnesses under oath in front of a notary as a means to make it much more difficult for someone to successfully contest the will based on claims of lack of testamentary intent or testamentary capacity; lack of voluntariness due to fraud, duress, or undue influence; improper execution or witnessing; or that the will is a forgery. In Wisconsin, a self-proving affidavit conclusively establishes that the will was properly signed and executed as required by Wisconsin law and creates a rebuttable presumption that the other requirements for a valid will have been met. (See Section 853,04, Wis. Stats).

Where to Keep the Final Draft of the Will

Many years ago, attorneys used to retain the signed original will in their office files. This is no longer considered a best practice. Instead, the attorney retains copies and provides the original to the testator for safekeeping. In some states, including Wisconsin, testators can file their original wills in the County Probate office for safekeeping for a nominal fee. The Will must be in a sealed envelope with the testator's name and address written or typed on the outside of the envelope. The Register in Probate will provide a receipt at the time of deposit. The original Will can only be removed by the testator or by a person authorized by the testator who has written permission to withdraw the will. The permission must be signed by the testator, and two witnesses other than the person who will be withdrawing the will from safekeeping. The original receipt and photo identification will also be required.

Testators who do wish to file their wills, or who are unable to do so, should be advised to keep the original in a safe place that is accessible to themselves and to their personal representative(s). If the will is to be kept in a safe (such as a water-proof and fire-proof safe, the key should be provided to the personal representative along with a detailed description of the safe's location. A safe deposit box at a bank should only be used if joint access/authorization is granted to the personal representative or other trusted person. Even in this circumstance, safe deposit boxes are not the best place to keep the original will, as the bank will seal the box when the testator dies and require proof of death and authority to access the safe deposit box before opening it. If the only proof of such authority is in the will itself, there may be lengthy delays.

Testators should also keep an unsigned copy of the will at their home for periodic review. Advise the testator to review the will whenever there are changes to the testator's family, economic situation, residence, health, or estate planning goals. Any time tax or property laws might affect estate planning decisions, the law office should contact the testator to explain those changes and provide advice as to whether the will should be modified.

Paralegal Roles

As mentioned previously, paralegals play a critical role in making sure wills are properly executed, so that will contests can be avoided. The paralegal will also help the attorney provide the client with recommendations regarding maintaining, keeping, and updating estate planning documents.

CHAPTER OVERVIEW

6: Probate

6.1: Basic Introduction to Probate

> *“In this world, nothing can be said to be certain, except death and taxes.” ~ Benjamin Franklin.*

When a person dies with a trust, the trust dictates what happens with the person’s property without the need for any court processes. However, if a person dies intestate, or dies with a will, probate is required. **Probate** is the court procedure in which a will is “proved,” and the decedent’s estate is collected, managed, and distributed. Each State has its own statutory probate process, and the process often differs depending on factors such as the size/value of the estate, whether the decedent has a surviving spouse, the type of property owned by the decedent (real property or personal property) at the time of death, and where the decedent’s real property is located.

Definition: Probate

Probate: the court procedure in which a will is “proved,” and the decedent’s estate is collected, managed, and distributed.

Probate Jurisdiction

Jurisdiction is the general power a court has to act and enter orders or judgments. There are three types of jurisdiction involved in probate matters: (1) subject-matter jurisdiction, (2) *in-rem j*urisdiction, and personal jurisdiction.

Definition: Terms Relating to Jurisdiction

Jurisdiction: The general power a court has to act and enter orders or judgments.

Subject-matter jurisdiction: The power of a court over certain types of disputes or legal actions.

In-rem jurisdiction: The power of a court over a thing that is located within the State.

Personal jurisdiction: The power of a court over a person, such that the court has the authority to make someone appear in the court and obey its orders.

Venue: The particular place, County, or Court in which the legal matter can/should be heard.

Subject-Matter Jurisdiction

In many states, including Wisconsin, all trial courts within the state have subject-matter jurisdiction over all types of civil or criminal actions, including probate actions. Challenges to a court’s subject-matter jurisdiction in probate are rare.

In-Rem Jurisdiction

In the context of probate, the “thing” over which the court must have power is the decedent's estate. A court will have in-rem jurisdiction over the decedent’s probate estate as long as the decedent is domiciled in the State at the time of death. A **domicile** is the place where a person intends to make their legal, permanent home. In contrast, a **residence** is a place where a person is living at any given time.

Definition: Domicile

Domicile: The place where a person intends to make their legal, permanent home. A person can have only one domicile.

Definition: Residence

Residence: A place where a person is living at any given time.

A person can have many residences, but only one domicile. A person’s intended domiciliary state is demonstrated by:

- Voter registration (a person can be registered to vote in only one State)
- Driver’s license and motor vehicle registration
- Income tax filings (address on the forms, State to which the person pays State income tax)

- Address listed on the person’s estate planning documents (wills, trusts, powers of attorney, etc.)
- Objective evidence of the person’s intent to make the State the person’s permanent home
- To a lesser extent: billing address for credit cards and other bills, location of the party’s employment, where the person does their banking, goes to church or school, where the person owns or rents real property

The key to determining domicile is indicators of permanence vs. temporariness. Vacations, visits, and “seasonal” dwellings are residences. Living in a state for the purpose of attending school or for limited-term employment does not make that state the person’s domicile, even if the person has lived there for several years. If the person intends to return to another state after finishing school or when the employment terminates, the State to which the person intends to return is that person’s domicile.

Example

Anatoly lives in Arkansas. After he hears about a high-paying job in Alaska, he decides he no longer wants to live in Arkansas; he sells everything he owns, moves to Oregon, and signs a 1-year apartment lease. The cost of living is high, and he decides that if he doesn’t find a job paying at least $100,000 by November, he makes plans to move to his cousin’s house in Arizona. In October Anatoly dies without having found steady employment. In this scenario, Anatoly was domiciled in Arkansas until he moved to Oregon. When he moved, he clearly intended to establish his domicile in Oregon. Although he had a potential future intent to leave Oregon and establish a domicile in Arizona, he had not yet taken definitive steps to do so when he died; in fact, his plan was not to do so until November, and then only if he didn’t have the type of employment he wanted. As a result, Anatoly was domiciled in Oregon when he died.

The decedent’s domicile gives a State in-rem jurisdiction over the decedent’s personal property, wherever it is located – even if it is located outside the State. However, the decedent’s domicile only gives a State in-rem jurisdiction over real property located within the State. if a decedent owns real property in a different State at the time of death that is subject to probate, only the State where that real property is located will have in-rem jurisdiction over it. As a result, if a decedent owns property in a non-domiciliary State, a separate probate action must be filed in the State where the real property is located. The purpose of **ancillary probate** is to determine who is to receive that real property and to ensure that the State’s procedures for transferring real property are followed.

Definition: Ancillary Probate

Ancillary probate: a court proceeding required when the decedent owns real property outside of the decedent's domiciliary state. Ancialary probate is limited to determining who is to receive that real property and ensuring that the State’s procedures for transferring real property are followed.

Personal Jurisdiction

In the context of probate, usually, this refers to the court's power over a fiduciary acting on behalf of the estate, the decedent’s heirs, and the beneficiaries of the estate. As with other court actions, to enter orders regarding the parties’ actions, rights to property, or other benefits/obligations, the court must have power over the parties being impacted by those orders. There are two primary ways a court can obtain personal jurisdiction over the persons having interest in a decedent’s estate:

- **Consent:** If a party starts a probate action by filing an application for probate/estate administration, that party (the petitioner) is agreeing that the court has personal jurisdiction over him/her. In the context of probate, typically this would be the person nominated as Personal Representative in the decedent’s will. Any of the decedent’s beneficiaries named in the will, as well as any of the decedent's heirs, would also qualify as persons who could start a probate action.
- **Service of Process:** After the probate action has been filed, the decedent’s beneficiaries, heirs, and creditors must be given official notice of the legal action. The type of notice required depends on the type of probate process that is being used, as well as the type of person being provided with notice (beneficiary, heir, or creditor).

Venue

Once it has been established that a particular state has jurisdiction, we must determine the proper **venue** (the particular place, County, or Court in which the legal matter can/should be heard) for the probate action. In most states, including Wisconsin, the venue is determined by the decedent’s domicile on the date of death; for example, if a person dies while domiciled in Brown County, Wisconsin, Brown County is the proper venue. If the decedent is not domiciled within the State on the date of death but owns real property within the State, then the County in which the real property is located is the proper venue for the ancillary probate.

Types of Probate Processes

Once the proper venue is determined, the next step is to determine the appropriate probate process to use for the administration of the decedent's estate. The goal is to choose the process that will be the simplest, quickest, and least expensive that is allowed, based on the following factors:

- Value of all of the decedent's probate property. Remember, certain types of property are considered non-probate property and are not included in probate proceedings (See Chapters 2.2 and 2.3). Also, property held in a trust is non-probate property (See Chapter 4.2)
- Whether the decedent has a surviving spouse who will inherit the entire probate estate.
- Likelihood of a will contest or need to address other complex issues involving the probate estate.

The eligibility and requirements for the different types of estate administration vary by State. However, each State provides processes for "small" estate administration and formal estate administration, at a minimum.

Transfer or Collection by Affidavit

Many states allow the smallest estates to be transferred to beneficiaries or heirs using an **affidavit**, a document that is sworn to and signed in front of a notary public. In most cases, the affidavit does not need to be filed with the probate court, no personal representative is appointed, and there is no requirement to provide notice to creditors. The affidavit (often accompanied by a certified copy of the death certificate) can be used to transfer most types of property, though many states do not allow real property to be transferred by affidavit. The person signing the affidavit (and thus receiving the property) should be the person who is legally entitled to receive the property; if the decedent died with a will, a copy of the will should accompany the affidavit. The property being transferred is specifically described in the affidavit, along with its value. The affidavit is presented to the person or entity possessing the described property, and then the property is transferred to the **affiant** (the person who signs the affidavit).

Definition: Affidavit, Affiant

Affidavit: a document that is sworn to and signed in front of a notary public.

Affiant: the person who signs the affidavit.

In Wisconsin, Transfer by Affidavit can be used when the total value of probate property (also known as the **gross estate**) is $50,000 or less. Real property can be transferred using this method; however, at least 30 days' notice must be provided by giving a copy of the Affidavit along with a statement of intent to transfer real property, to each of the decedent's heirs (after which the Affidavit can be filed in each County in which the decedent owns real property). Additionally, if the decedent or the decedent's spouse received certain State or community benefits, the Wisconsin Department of Health Services Estate Recovery Program must also be notified. Additional forms may also be required.

Definition: Gross Estate

Gross estate: the total value of all probate property.

Summary Proceedings

Some states, including Wisconsin, have additional simplified probate processes that can be used in certain situations. In Wisconsin, summary proceedings can be used when the value of probate property, less the amount of the liens or mortgages on probate property (also known as the **net estate**), does not exceed $50,000. It may also be used whenever the value of the estate does not exceed the **priority debts** (e.g., taxes, administrative, funeral and burial, last illness, spousal, and family allowances). If there is a surviving spouse or minor children, the process is called **Summary Settlement**. A similar process – **Summary Assignment** – is available for these same types of estates where there is no surviving spouse or minor children.

Definition: Net Estate

Net estate: the total value of all probate property, less the amount of the liens or mortgages attached to the probate property.

Definition: Priority Debts

Priority debts: debts that must be paid first, pursuant to state statutes. Examples include taxes, administrative, funeral and burial, last illness, spousal, and family allowances.

Informal Administration

This is the administration of the decedent's estate, testate and intestate, without the exercise of continuous supervision of the court; the estate administration is completed under the supervision of the **Probate Registrar/Register in Probate.** The Probate Registrar is an official of the court designated to handle the administration of all informal probate proceedings. In Wisconsin, the Probate Registrar also provides assistance to the circuit courts, attorneys and the general public with professional and proficient services that facilitate proceedings for the administration of estates, trusts, guardianships, protective placements, and juvenile and adult civil mental, drug and alcohol commitments. This includes:

- Management of all probate files, wills filed for safekeeping, trusts, guardianships, conservatorships, protective placements, mental, alcohol and drug abuse commitment records;
- Providing assistance to the public and attorneys with court practices and procedures for wills, probate, guardianships, conservatorships and protective placements;
- Providing assistance to the public regarding access to open records;
- Collecting fees as required by statute;
- Annual review of all guardianship and protective placements;
- Appointment of temporary guardians;
- Conducting pretrial conferences.

Definition: Probate Registrar

Probate Registrar: a court official designated to handle the administration of informal and summary probate proceedings.

Formal Administration

This is the administration of a decedent’s estate under the supervision of a Circuit Court, Probate Court, or Judge. This type of probate is required if there are interested parties who wish to contest the validity of the decedent’s will or who do not agree to the appointment of the nominated personal representative> It is also required if the decedent died intestate and all heirs do not consent in writing to Informal Administration. An interested person/heir/beneficiary can also demand Formal Administration at any point during the probate proceedings.

Ancillary Probate

As mentioned previously, the decedent’s domiciliary state does not have in-rem jurisdiction over the decedent’s real property located in a different state. If the decedent owns property in another state, an ancillary probate action must be filed in that state to determine who is to receive that real property and to ensure that the state’s procedures for transferring real property are followed. Typically, a resident of that state must be appointed as ancillary administrator (although some states allow the personal representative of the probate action in the decedent’s domiciliary state to act as ancillary administrator).

Determination of Descent

Sometimes, a probate action is not started immediately after a person has died. In Wisconsin, if 6 or more years have passed since the decedent’s death and the decedent died intestate, an interested person may file a Petition for Determination of Descent, which is a simplified process for requesting the Court to determine the identity of the decedent’s heirs and who has the right to receive the decedent’s property.

Probate Participants

Depending on the probate process being used, some or all of the following persons will be involved:

- **Attorney/Paralegal**. When a law office is retained to complete the process, the client is the decedent's estate, by and through the personal representative, administrator, or person applying for estate administration on behalf of the estate.
- **Register in Probate/Probate Registrar.** This person, who is an officer of the court and typically has an office in the courthouse, handles informal and summary probate proceedings.
- **Probate Court/Judge**. If formal probate proceedings are required, they must be filed with and handled by the Circuit Court.
- **Applicant.** This is the person who hires the law office to start the probate process. This person is typically interested in the decedent's estate as an heir or as a beneficiary or personal representative named in the decedent's will.
- **Personal Representative/Administrator.** This is the person appointed by the probate registrar/court to oversee the administration of the decedent's estate. The personal representative may be a family member, friend, business associate, financial institution, or trust company. If the will does not designate a personal representative, or if there is no will, the court appoints one (and this person is then called an **administrator**). The personal representative's main duties are to:
  - Identify and collect the decedent's assets.
  - Manage those assets during the probate process.
  - Determine the surviving spouse's rights under the state marital property law.
  - Pay debts, claims, taxes, and probate administrative expenses.
  - Make any distributions to the surviving spouse or dependent children required under state law.
  - Distribute the remaining assets to those named in the will (or if there is no will, to the heirs at law).
- **Heirs.** The decedent's blood relatives are considered "interested persons" who are entitled to notice of the estate proceedings, regardless of whether they are named – or even disinherited – in the decedent's will (if there is a will). These persons may waive the right to notice and consent to the estate administration.
- **Beneficiaries.** If the decedent died with a will, all persons named as beneficiaries in the will are "interested persons" who are entitled to notice of the estate proceedings. These persons also may waive the right to notice and consent to the estate administration.
- **Guardians.** If any heir or beneficiary is a minor child or is mentally incompetent, a guardian must represent that person's interest in the probate. For minor children, the guardian may be nominated in the decedent's will; otherwise, the guardian is typically the minor child's parent or other appointed legal guardian. For incompetent beneficiaries or heirs, if the will does not nominate a guardian of the estate, the court must appoint one.

Paralegal Roles

When it is time to probate an estate, paralegals play a critical role in assisting the attorney representing the estate. Among the important early tasks are locating the will, if there is one; assisting with identifying and locating the decedent's heirs; setting up the family conference and notifying all of the decedent's heirs and beneficiaries of the decedent's will; assisting with reviewing probate procedures with the heirs/beneficiaries; assisting with locating and preserving the decedent's property; identify the decedent's creditors; set up ticklers and reminders for various probate procedures (signing of documents, filing probate forms, obtaining a federal tax ID number for the estate, serving/publishing required notices, scheduling required hearings, completing tax returns, etc.); establish methods for keeping records of collected/distributed property, payment of debts/expenses, and other required information; draft and, after the attorney approves, arrange for signing and filing of probate forms.

6.2: Basic Introduction to Personal Representatives

One of the most important people in the probate process, and the person who has the most work to perform, is the personal representative. Each state has its own requirements and restrictions regarding who can be a personal representative and the type of authority/duties that person has once appointed.

Personal Representative Basics

Before diving into the details of personal representatives and their duties, there is some terminology with which you should become familiar.

> **Definition: Terms Relating to Personal Representatives**
>
> **Personal Representative:** the general term for the person authorized/empowered to administer an estate
>
> **Executor:** a personal representative named in a decedent's will
>
> **Administrator:** a personal representative appointed by the Court when the decedent has died intestate
>
> **Special Administrator:** a personal representative appointed by the court for a limited purpose or a temporary period of time
>
> **Administrator *cum testament annexo* (cta):** a personal representative appointed by the court when the decedent's will did not name a personal representative, or all of the personal representatives nominated in the decedent's will are unwilling or unable to act
>
> **Administrator *de bonis non* (dbn):** a personal representative appointed by the court when the primary personal representative dies or becomes incapacitated before estate administration is completed
>
> **Public Administrator:** a personal representative appointed by the court when property escheats to the State
>
> **Fiduciary Duty**: the duty to always act in the best interests of someone else, and to not use his or her position to his/her own personal, financial, or business benefit.

Regardless of the type of personal representative and how the person is appointed, that person owes a **fiduciary duty** to the decedent's estate. This means that the personal representative must always act in the best interests of the estate and persons entitled to receive the benefits of the estate. A personal representative cannot use his or her position to his/her own personal, financial, or business benefit at the expense of the estate. Also, the estate assets must be kept separate from the personal representative's personal assets.

Nearly all states restrict the types of persons allowed to act as personal representatives, and the personal representative may be required to pay a bond. The goal is to ensure, as much as possible, that the person behaves with the utmost integrity, care, and financial responsibility.

Typical restrictions/requirements include:

- **Age requirements**. Most states require the personal representative to be 18 years of age or older; some states require the personal representative to be 19 or 21 years of age or older
- **Capacity requirements**. Most states disqualify anyone of "unsound mind" or who is adjudicated mentally incompetent, incapacitated, or disabled. Other states also disqualify persons who are "habitual drunkards" or alcoholics, persons who are spendthrifts or have declared bankruptcy, and persons of "bad moral character."
- **Legal disqualifications**. Many states disqualify persons convicted of a felony, a misdemeanor involving "moral turpitude," or an "infamous crime" from being personal representatives. Oregon disqualifies attorneys who have been disbarred or had their law licenses revoked.
- **Residency requirements**. Some states require the primary personal representative to be a resident of the state. Other states allow non-residents to be personal representatives, but they must pay a bond or appoint a resident agent who lives within the state.

Serving as the personal representee is a serious responsibility. It requires careful organization and attention to legal requirements. The personal representative has a fiduciary duty to act in the best interests of the estate and its beneficiaries. They can face legal liability if they fail to meet this duty, such as when they act in their own interests or allow the assets in the estate to decay.Once appointed, a personal representative who engages in conduct that would have resulted in disqualification may be removed. Similarly, a personal representative who breaches his/her fiduciary duty or fails to take prompt action to advance the estate administration process may be removed.

Duties of the Personal Representative

The personal representative is responsible for administering the estate through the probate process. This includes finding and organizing important documents; collecting, preserving and insuring the decedent's probate property; taking steps to open a checking account for the estate; paying probate expenses, valid claims against the estate, and debts owed by the decedent according to statutory priority; accurately tracking all estate transactions including receipts, payments, and distributions; placing a value on estate assets; filing required tax returns for the decedent and/or the estate; working with various agencies, the probate court, trustees (if the estate includes a trust), and estate beneficiaries; and distributing probate property according to the provisions in the decedent's will (if there is one) and applicable state statutes. While personal representatives are allowed to hire and pay appropriate experts such as financial experts, tax experts, appraisers, realtors, and attorneys, the personal representative is still ultimately responsible for the entire probate process.

Finding and Organizing Documents

The personal representative is responsible for finding and organizing all the necessary documents to manage and probate the estate. First, the personal representative should obtain an official copy of the death certificate. Another important document is the will, if there is one. The original will is best, although the personal representative should also hold on to any copies of the will as well as any older versions. The will's terms will give the personal representative a better sense of the estate and the beneficiaries. Finally, the personal representative should search for any other documents that detail the property that the decedent owned and the status of their estate. These documents will help the personal representative manage the estate and distribute the assets. The decedent's documents also may give the personal representative a better sense of the people, organizations, and entities in the decedent's life.

Deciding Whether Probate Is Necessary

If the value of the estate's property is relatively modest, or if most of it will pass without probate, the estate may be eligible for small estate procedures or informal probate. If all of an estate's property qualifies for transfer outside probate, a probate case will not be necessary. Small estate procedures or avoiding probate altogether can save the estate money and the personal representative time.

This may also be a good time for the personal representative to decide whether a probate lawyer would be helpful. Probate lawyers are typically the most helpful when an estate is large or complex, or when probate litigation is likely. If ancillary probate is necessary because the decedent owned certain property that will pass through probate in a second state, a probate lawyer familiar with the laws of the second state may be helpful. Additionally, the courthouse may offer low-cost legal resources, and staff lawyers or court clerks may be able to answer procedural questions and review documents.

Determining Ownership of Assets in the Estate

The ownership of assets in the estate will help the personal representative determine whether probate is necessary. If the decedent owned property with another person in joint tenancy or tenancy by the entirety, or as community property with right of survivorship, that property will pass to the surviving co-owner without the need for probate. Some property not specifically held as community property with right of survivorship may still be transferred outside probate or with simplified procedures, depending on the circumstances. Property such as trust property, retirement accounts, and life insurance proceeds may also transfer to its new owners without the need for probate.

Filing a Petition With Probate Court

If probate is necessary, the personal representative may file a petition for probate. A probate petition usually includes an application to be appointed as the personal representative, the death certificate, and the original will. The petitioner must ask the court to appoint a personal representative, even if the personal representative is already named in the will. Some states allow certain other interested parties in addition to the personal representative named in the will to file a probate petition. Once the court approves the probate petition, it will open the probate case. For certain kinds of probate, such as small estate procedures, a petitioner may need to certify that all of an estate's debts and taxes have been paid before opening the probate case.

Filing the Will With the Probate Court

Most states require that a will be filed within a certain amount of time after death or discovery. The deadline varies by state, but anyone in possession of a will usually has about 10 to 30 days to file it. The probate court will likely require that the filed will be the original, so the personal representative should make copies before filing. It is not necessary to file a petition for probate with the will, since the personal representative may need more time to determine whether a probate case is even necessary or whether the estate qualifies for certain small estate procedures. However, filing the will is likely required by state law, even if the estate will not pass through probate.

Proving the Will

The personal representative will be tasked with proving the will after opening the probate case. A will must be proven valid before a probate court will allow the distribution of assets according to its terms. A valid will is broadly a will that is in writing, signed by a testator with capacity, and witnessed. Some states may accept unwitnessed wills ("holographic wills") with additional evidence. A probate court may also accept a copy of the will if the original cannot be found and if there is other evidence of the will's validity.

Notifying Interested Parties and Agencies of the Death and the Probate Case

A personal representative should ensure that a decedent's loved ones are notified of their death in a timely manner. Personal representatives have a duty to keep beneficiaries and heirs reasonably informed of the status of the estate. Even if the personal representative has not yet decided whether to open a probate case, they should let beneficiaries and heirs know of their current plans and update them if those plans change. Clear and frequent communication may allay concerns and avert future objections or litigation.

In addition to beneficiaries and heirs, the personal representative must notify other entities of the decedent's death in order to protect the estate's financial interests and obligations. For example, the personal representative may need to contact the decedent's landlord to negotiate payment and lease termination if the decedent rented their home. They may also need to contact entities such as the Social Security Administration, the post office, and the Department of Motor Vehicles.

After the probate case is opened, the personal representative will be responsible for notifying all beneficiaries, heirs, and creditors of the probate case. The process for notification may vary by state, but the personal representative will likely be required to file proof of notification with the probate court. If the personal representative cannot find or identify certain beneficiaries or heirs, they may need to follow a specific search process. The personal representative may be allowed to notify creditors of the probate case at a different time than beneficiaries and heirs. Once creditors are notified of the case, the court will issue a deadline for creditor claims.

laiming Benefits During Probate

The family members of a decedent may face certain financial burdens in the aftermath of the death. Fortunately, they may be able to rely on sources such as life insurance, annuities, and Social Security benefits to offset many of these costs. Family members also may have access to any unpaid wages or other employment benefits that were due to their loved one when they died. A personal representative may not be required to handle the process of claiming benefits but may help beneficiaries and heirs navigate it.

Taking Inventory and Valuing Assets in the Estate

A personal representative is responsible for taking inventory and valuing the assets in an estate so that they can properly distribute those assets. The personal representative should organize a worksheet that lists all assets and their value. The finalized inventory may be filed with the probate court, and many probate courts offer inventory worksheets. In order to value the assets, the personal representative may hire professionals such as appraisers, especially if the assets are complex. The inventory and valuation should also include any debts of the estate. Amended inventories should be filed, if necessary, before taking steps to close the estate.

Managing Assets in the Estate

During the probate process, the personal representative is responsible for managing the estate's assets and preventing those assets from suffering avoidable damage or depreciation. The personal representative has a fiduciary duty to always act in the best interest of the estate. In order to effectively manage the estate, the personal representative will probably need to open an estate bank account, take measures to secure and maintain real estate and other property, and make investment decisions. Managing the estate may also involve selling assets, collecting debts, or transferring assets to beneficiaries early. If the decedent had a trust, the personal representative may need to coordinate with the trustee. The personal representative should keep written records of all the actions taken to manage the estate. The personal representative may also be required to periodically produce documents known as "accountings" that track the financial activity of the estate. If the personal representative decides to distribute some assets early, they should be sure that the estate can pay all of its liabilities and that certain deadlines, such as the deadline for a spouse to take against the will, have passed. If the estate cannot meet its obligations because of the personal representative's mistake, the personal representative may be personally liable.

Paying Debts and Taxes From the Estate

The personal representative must pay any legitimate debts held by the decedent or the estate, including taxes. However, if it seems that the estate may not have enough money to pay its debts, the personal representative should seek the advice of a probate attorney or ask the probate court for guidance regarding which debts take priority. Certain assets may be shielded from an estate's creditors by state law. If a probate case is open, creditors will have only a limited amount of time to make claims against the estate or to dispute the personal representative's rejection of a claim. Some state laws impose a deadline on personal representatives to evaluate and pay legitimate debts.

Distributing Estate Assets and Closing the Estate

Once the deadline for creditor claims has passed, the estate has paid all legitimate debts, tax returns have been filed, and any disputes have been settled, the personal representative may be ready to formally close the estate. Before closing a probate case, the personal representative will likely be required to file certain documents with the court. These will include a final accounting in which the personal representative details the activity on the assets of the estate, payment of the estate's debts, and the plan for distributing assets to beneficiaries and heirs. There may be a state law deadline for transferring cash gifts to beneficiaries. If an personal representative misses this deadline, the estate may need to pay the gifts with interest. If the court approves the distribution plan, the personal representative may distribute all of the estate's assets, file proof with the court, and ask that the court formally close the probate case. Once the probate case is closed, the personal representative's job is done.

(Justia.com, An Executor's Legal Duties)

Paralegal Roles

One of the paralegal's primary roles is assisting the personal representative with his/her probate duties, in addition to performing tasks mentioned in Chapter 6.1. The paralegal should assist the personal representative by providing task checklists with timelines. These checklists can help the personal representative avoid the common pitfalls of failing to properly insure probate property in case of fire/accident, failing to timely file tax returns, or improperly paying claims. A ledger, spreadsheet or other document to assist with keeping records of estate cash transactions (including payments and receipts) is also helpful. Finally, the paralegal can assist the personal representative with avoiding premature or improper distribution of estate assets.

6.3: Basic Introduction to Informal Probate

Informal probate is the most commonly used process in Wisconsin. If the value of the decedent's estate is greater than $50,000, informal probate is the simplest and least expensive process that can be used. There are some important steps to be taken prior to commencing informal probate. Once the probate has begun, there are also important deadlines and procedures to follow to ensure the process moves forward with minimal delay. This chapter will generally outline those procedures.

Preparing for Probate

The first step that must be taken is determining whether the decedent died with a will; if so, the will and any other pertinent documents (for example, letter of last instructions, authorization for final disposition) should be located. In Wisconsin, if the decedent died with a will, it must be filed with the probate office within 30 days of death even if no probate proceeding is required.

Typically, the paralegal assists the personal representative with contacting the decedent's family, business associates, and/or advisors (accountants, brokers, agents, etc.). Because certified copies of death certificates are sometimes required to complete certain transactions before the probate application has been approved, the personal representative should also obtain them from the decedent's funeral director or the Vital Records office.

An important next step is notifying the appropriate parties of the decedent's death and taking action to protect the decedent's assets. Subscription services (including streaming services) should be terminated/canceled; insurers, financial institutions, and credit card issues must be notified (and credit cards frozen/canceled); and online shopping websites (such as Amazon, eBay, etc.) should be suspended. If the decedent died with a will, named beneficiaries should be contacted and provided with a summary and/or copy of the will.

As soon as possible, a family conference should be scheduled. If the decedent died with a will, the named beneficiaries and fiduciaries (personal representatives, guardians, trustees) should attend. Regardless of whether the decedent died with a will, the decedent's surviving spouse (if any) and heirs should also attend. If an heir or beneficiary is missing, the personal representative is obligated to act with due diligence by reasonably attempting to locate and contact them. Methods for locating missing heirs/beneficiaries are discussed later in this chapter.

Often both the attorney and the paralegal attend the family conference, during which the following topics should be discussed:

- The provisions of the decedent's will, if any. Copies should be provided, and signatures obtained on a Waiver and Consent form, if the parties are willing to agree to the admission of the will to probate and appointment of the nominated personal representative.
- If the decedent died intestate, the rules of intestate succession should be explained.
- The need for the appointment of fiduciaries, if applicable, such as guardians for the person/estate of minor beneficiaries, conservators for incompetent persons, or trustees for testamentary trusts. If the will nominated such persons, determine whether they are willing and able to serve, and obtain signatures on the Consent to Act or Declination to Serve form, as appropriate.
- Additional information about the decedent's assets (including location and value), explaining the difference between probate and non-probate property. The attorney should also determine whether the decedent made any advancements to any beneficiaries or heirs.
- Information about the decedent's obligations (including debts, liens, credit agreements, loans from family or friends, etc.). If it may be necessary to sell assets to pay debts, taxes, or other expenses, discuss rules regarding abatement.
- The importance of continuing to pay insurance premiums, providing coverage to the decedent's real property, automobiles, or other personal property, as well as the need to safeguard and limit access to the decedent's property until it can be properly distributed.
- Determine whether any of the decedent's family members might be eligible for allowances, homestead exemptions, or other protections during the probate process, or spousal elections. If so, find out whether they desire to receive these benefits and explain the procedures.
- Explain the right of heirs and beneficiaries to disclaim all or part of what they are to receive from the decedent's estate.
- Advise the personal representative that he/she does not have the authority to act until Domiciliary Letters have been granted by the probate court.
- Any other information required to complete the following forms:
  - Application for Informal Administration
  - Proof of Heirship

If all goes well at the family conference and everyone agrees, the paralegal can begin completing the forms required to begin Informal Probate. As part of this process, it will be important to create a checklist with ticklers/reminders for important deadlines relating to filing the Application and other required forms, publishing required notices, filing and paying income and real property taxes, deadlines for spousal elections, and claims, preparing and filing the Estate Inventory, preparing and filing Estate Account(s), and closing the estate.

Potential Probate Problems

Unfortunately, probate proceedings do not always go smoothly. Some of the more common problems involve infighting between beneficiaries or heirs, and uncooperative or dishonest behavior by beneficiaries, heirs, or even the personal representative. In those situations, strict adherence to the provisions of the decedent's will (if any) and to Wisconsin statutes is required, and the attorney may need to request the probate court to intervene. Other problems that can arise are will contests and difficulty locating beneficiaries and/or heirs.

Will Contests

A will contest is an action during probate that challenges the validity of the decedent's will that has been filed for probate. Only certain persons have the right to contest a will. In the context of probate, a person has **standing** to contest the will if that person has a stake (also called a pecuniary or monetary interest) in the decedent's estate that will be lost or diminished if the will is allowed. These persons include the decedent's surviving spouse, heirs, or beneficiaries in the will or other wills allegedly signed by the decedent. Generally, the decedent's creditors lack standing to contest the will because they can file claims regardless of the outcome of the will contest; however, creditors must still be given notice of the probate proceedings. Most states limit the time period for contesting a will; in Wisconsin, a will is admitted to probate within 30 days after it is filed unless there is an objection.

Definition: Standing

Standing to contest the will: the legal right to file a legal action challenging the will. The person must have a stake (also called a pecuniary or monetary interest) in the decedent's estate that will be lost or diminished if the will is allowed.

In Wisconsin, if one or more heirs or beneficiaries refuse to sign a Waiver and Consent allowing the will to be admitted for probate, a Notice Setting Time to Hear Application and Deadline for Filing Claims must be filed. A copy of the notice and the will must be sent to all heirs and beneficiaries (as well as creditors, although they do not have standing to contest the will), and it must be published in the official newspaper for the County in which decedent was domiciled at death.

A person desiring to contest the will must file an objection prior to or at the hearing that states the reasons for the objection. Potential grounds for a will contest include:

- The will was not properly executed
- The testator was induced by fraud or undue influence to write or change the will
- The testator lacked testamentary capacity
- The will has been revoked or is not the most recent will signed by the decedent

As mentioned in Chapter 5.2, if the decedent and witnesses to the will properly executed a self-proving affidavit, these challenges are often unsuccessful. In the absence of a self-proving affidavit, the persons who signed the will as witnesses will be asked to testify concerning the circumstances surrounding the will's execution; other testimonial and documentary evidence may also be presented to prove or disprove the asserted reasons for the will contest.

Will contests are often time-consuming and very expensive. Although the "losing" party may be ordered to pay expenses and attorney fees associated with the will contest, it can be difficult for the estate to recover these costs. If the person contesting the will is successful, estate administration proceeds pursuant to intestacy laws unless the decedent had a prior valid will.

Missing Heirs/Beneficiaries

The personal representative has a duty to give **notice** to all beneficiaries and other heirs of a probate case. Heirs and beneficiaries have not only a right to know of the status of probate proceedings, but also certain rights to object to or otherwise participate in probate proceedings. The following persons are entitled to notice of the probate proceedings and to receive a copy of the decedent's will (if any): all of the decedent's heirs, regardless of whether the decedent died with a will or trust; all of the beneficiaries and personal representatives named in the decedent's will (if any); and beneficiaries and trustees of the decedent's inter vivos or testamentary trust (if any). The personal representative is generally required to identify all beneficiaries and heirs at the beginning of the probate process so that they may be notified. Therefore, if an heir or beneficiary is missing, an executor must make a good-faith effort to locate them. Sometimes, heirs and beneficiaries can be difficult to locate.

If an heir or beneficiary is missing, the personal representative is obligated to act with due diligence by reasonably attempting to locate and contact them. For example, a court may require that the personal representative publish notice of the probate case in a local paper for a certain period of time. The personal representative may also be responsible for taking other reasonable steps to locate and contact missing heirs and beneficiaries, such as contacting other known relatives, friends, or partners, searching last known addresses, searching property records, contacting past employers, searching online (including social media), or hiring a private investigator.

Methods of Locating Missing Heirs

- Contacting known relatives, friends, or partners
- Searching last known addresses
- Searching property records
- Contacting past employers
- Searching online
- Hiring a private investigator
- Publishing a notice in a local newspaper

State law may define what reasonable steps may be for the personal representative who cannot locate or contact a beneficiary or heir, but whether the personal representative has satisfied their obligation might be within the discretion of the court. Furthermore, the personal representative may be required to ask the probate court's permission before spending the estate's funds to locate a missing beneficiary or heir.

So long as the court finds that the personal representative has undertaken a good-faith effort to locate and contact a missing beneficiary or heir, the probate process may proceed without the beneficiary or heir. If the personal representative ultimately cannot locate or contact a missing beneficiary or heir, they will likely need to file a sworn statement with the court detailing their attempts. They may also need to petition the probate court to continue proceedings, or later close the case, without the beneficiary or heir.

If there is a will, it may specify how a gift should be handled if a beneficiary remains missing throughout probate. If there is no will, or if the will does not speak to missing beneficiaries, state law may determine how a probate case will proceed with a missing beneficiary or heir. In some states, the court will treat the missing beneficiary or heir as if they were dead and distribute any award according to the will or state law for a deceased beneficiary, or intestate succession laws for a deceased heir.

Alternatively, the court may order that the inheritance of the missing heir or beneficiary be held in trust or otherwise protected for a certain amount of time or until the missing beneficiary or heir comes forward. The court may appoint a guardian ad litem or trustee to oversee the assets. If the beneficiary or heir does not collect the award, their heirs may be permitted to petition the court to release the award to them. Otherwise, the award may eventually be transferred (or "escheated") to the state. Most states will hold the award for another period of time to give the missing beneficiary or heir one more chance to come forward before permanently taking control of the assets.

Missing heir rules may apply even if the heir or beneficiary is not actually missing, but is refusing to accept an award or otherwise participate in probate proceedings.

(Justia.com, Searching for Missing Heirs and Beneficiaries & the Legal Process)

Paralegal Roles

One of the paralegal's primary roles at the beginning of the probate process is assisting the personal representative with completing the forms necessary to initiate informal estate administration. Usually, the forms are prepared using information gathered from the personal representative regarding the decedent's heirs, beneficiaries, and assets; most of the forms are prepared for signature by the person seeking to initiate the probate and/or appointment as personal representative for the estate. The paralegal should impress upon the personal representative the importance of detailed and accurate record-keeping and of acting with the utmost integrity with respect to estate assets. The personal representative should also be advised not to make payments out of estate assets until directed and reminded that he/she does not have the authority to act with respect to the estate until he/she has been officially appointed by the probate court.

If anyone objects to the admission of the will, the probate proceedings, or to the appointment of the nominated personal representative, the paralegal will work with the attorney to gather evidence and prepare for the hearing to resolve these issues. The paralegal may also be asked to assist with locating missing heirs or beneficiaries using public records and other available online tools or platforms.

6.4: Basic Introduction to Managing Probate Property

As mentioned previously, the personal representative is responsible for administering the estate through the probate process. With respect to property, this includes preserving and insuring the decedent's probate property; placing a value on estate assets; paying verified debts and properly made claims against the estate; managing the probate estate; and distributing probate property according to the provisions in the decedent's will (if there is one) and applicable state statutes. While personal representatives are allowed to hire and pay appropriate experts such as financial experts, tax experts, appraisers, realtors, and attorneys, the personal representative is still ultimately responsible for the entire probate process.

Preserving and Insuring Probate Property

After the decedent's probate property has been identified and collected, it must be protected from damage, destruction, misuse, loss, theft, and other circumstances that might decrease its value. Recommended actions depend on the type of property and its location.

Preserving and Insuring Real Property

Maintaining casualty insurance coverage on real property (including land, houses, structures, and contents within houses and structures) is of utmost importance. The paralegal may be asked to contact the decedent's insurance agent to inform the agent of the decedent's death and to ensure that coverage will continue. The paralegal should also check property tax records to confirm that property taxes have been paid as required, as well as to determine when upcoming tax payments are due and the amount. Similarly, payments on mortgages or other lines of credit attached to the property must be kept current. Houses and other structures on the property must be secured against entry by re-keying locks and/or adding locks or security systems, as necessary. Steps should be taken to make houses appear to be occupied (turning lights on) yet secure (closing drapes/blinds and otherwise preventing people from looking inside). The personal representative should contact providers of utilities to ensure bills are current and that future bills are sent to the personal representative for payment. If the property is to be sold, appropriate appraisers and realtors should be hired to handle the sale.

The personal representative should plan to pay expenses relating to these items out of the estate checking account until the real property is sold or distributed to the decedent's beneficiaries/heirs. Detailed records of these transactions should be kept, with the payments being deducted from the proceeds of the sale of the property or otherwise charged to the beneficiaries/heirs receiving the property. Before distributing the property, any outstanding liens against the property must be paid off, including mortgages (which may need to be refinanced by the beneficiaries/heirs receiving the property).

Preserving and Insuring Motor Vehicles

Cars, boats, snowmobiles, ATVs, and other motor vehicles present unique concerns, particularly with respect to liability for the estate. Not only should accident insurance be kept current, but their use should be prohibited (or at least limited as much as possible) until they are sold or distributed to the decedent's beneficiaries/heirs. Again, the paralegal may be asked to contact the decedent's insurance agent to inform the agent of the decedent's death and to ensure that coverage will continue. Lienholders should also be contacted and any outstanding liens (that is, vehicle loans) should be satisfied. Once the proper distribution of the vehicle is determined, it is best to remove it from the decedent's estate and officially transfer the title as soon as possible.

Preserving and Insuring Financial Assets/Liabilities

As soon as the personal representative is appointed and receives domiciliary letters from the probate court, steps should be taken to close all of the decedent's accounts at banking institutions, credit card issuers, and shopping websites, and any unnecessary subscriptions or other services should be canceled. The personal representative should carefully document the value of each probate account that the decedent's will (if any) directs to be distributed to a specific beneficiary or testamentary trust. The value of any probate accounts that will become part of the residuary estate or constitute intestate property should be placed into the estate checking account and the personal representative should carefully document the source(s) of these amounts.

Preserving and Insuring High-value Tangible Personal Property

If there is any doubt as to whether a specific item is more valuable than ordinary "rummage sale" value, the personal representative should have it appraised. Tangible personal property such as jewelry, art, antiques, collectibles, precious metals, equipment or electronics, formal tableware/stemware/silverware, musical instruments, and memorabilia should be carefully considered as potentially high value. High-value items are best handled by appropriate dealers, auction houses, and appraisers, to ensure the estate receives the appropriate value for each item. Until these items can be properly sold or distributed to the decedent's beneficiaries/heirs, they should be stored in a secure and safe place, and possibly also insured against loss.

Valuing Probate Property

Once the personal respresentative has identified and collected the assets in the decedent's estate, the personal respresentative will want to determine the value of the assets. This is generally required by the probate court and also will be helpful in determining whether the estate owes federal or state estate tax. Also, beneficiaries may want to know about the value of the share that they are receiving and the taxes for which they may be liable. In some cases, a valuation reveals that an estate may qualify for a small estate version of probate. This can make the process of distributing assets simpler and more efficient.

Valuing Real Property and Vehicles

The personal respresentative can enlist real estate agents to provide an estimate of a property's value. They may be able to compare it to similar homes in the area and evaluate the state of the market from a seller's perspective. If the personal respresentative wants a more thorough analysis, or if the property has a commercial use, the personal respresentative can hire a real estate appraiser through an agent, broker, or bank. An appraisal comes with some cost but should be pursued promptly because property values can change after the decedent's death. The personal respresentative should record not only the fair market value of the real estate but also the equity in it, which involves collecting information on the mortgage.

If a vehicle has special intrinsic value, such as an antique, the personal respresentative may need to get an expert appraisal. Otherwise, for a typical used car, you can check the Kelley Blue Book at **kbb.com** for guidance.

Valuing Personal Property

If the decedent owned valuable artworks or antiques, the personal representative can get an expert valuation by contacting an art museum or an auction house. Teh personal representative can also review similar items at eBay to get a sense of the price that they would secure on the open market. The American Society of Appraisers or the Appraisers Association of America may provide assistance as well. These appraisals can be expensive, so the personal representative should pay the appraiser by their time rather than a percentage of the asset's value.

Valuing Securities

To get an estimated value of stocks, the personal respresentative can either ask the firm that managed the decedent's investments or consult a newspaper for the prices of the stock on the date of the decedent's death. (You would then need to average the lowest and highest prices.) Some stock may be more valuable than it appears on first blush. Most people own common stock, but preferred stock or other types of stock may be more valuable. For bonds, the personal respresentative can do something similar and then add accrued interest that was due but not yet paid when the decedent died.

Valuing Businesses

The personal representative will need to contact a professional appraiser to value the tangible and intangible assets of a business. This will be important if the personal representative needs to file a federal estate tax return. If the decedent owned a share in a limited partnership, the personal representative can review the agreement to find out the extent of their interest. Then, the personal representativec an retain a CPA or contact the partnership to estimate the value of their interest.

Valuing Debts Owed to the Estate

Debts owed to the estate or to the decedent may have value. For instance, the personal representative may be able to collect the debt on a personal loan that the decedent extended to a friend. The estate may also be able to collect damages awards from lawsuits, such as a **survival action**. (Justia.com,Valuing Assets in an Estate & Legal Considerations)

Payment of Debts and Claims

After valuing all of the estate's assets, the personal representative will want to identify and value all of the debts that the estate owes. Some common types of debts include credit card debts, utilities, unsecured loans, and expenses associated with the decedent's funeral, burial and/or final illness. The the personal representative should make a note of the creditor, the amount of the debt, and the due date of the next payment.

Any and all known creditors – including service or subscription providers with which there is an outstanding balance – should be mailed a copy of the Notice to Creditors (or Notice Setting Time to Hear Application and Deadline for Filing Claims). The personal representative should refrain from paying any unsecured debt until the attorney has advised that payment is proper pursuant to the statutory order of preference (See §859.25, Wis. Stat.), or because a claim has been properly filed with the probate court.

The personal representative of an estate will need to oversee the payment of claims and debts from the assets of the estate, although the personal representative is usually not personally liable for them. In some cases, however, the estate may not need to repay a certain type of debt. For example, the estate also may not need to pay back credit card debt in some situations, and student loan debt sometimes is forgiven, depending on the loan terms. Insurance policies, like health insurance, may also cover certain debts.

Another type of debt that may or may not be due involves Medicaid benefits for which the state is seeking reimbursement. Many people who receive Medicaid do not have enough assets to reimburse the state, and some state laws require reimbursement only from assets that pass through probate. The state likely will not be able to get reimbursement from the estate if the decedent left behind a spouse or a dependent child, or if it would cause an undue hardship.

Creditors usually make informal claims on an estate, which are received as bills Sometimes attorneys advise against paying any unsecured debt that is not a priority debt unless the creditor has filed a claim against the estate. The personal representative must notify creditors of their right to make claims during this process. The probate court or state law will provide a deadline for creditors to make formal claims or dispute an personal representative's decision not to pay a claim. Requiring creditors to file claims provides opportunity to negotiate settlement of debts for lower amounts, which benefits the estate.

If the estate does not contain enough funds to pay debts, the personal representative may be required to sell assets to generate funds, which is a reason to wait to distribute property until the personal representative knows that the estate has enough money to cover debts. If the estate still does not have enough funds once the prsonal representative has sold the estate's assets, state law will determine which debts have priority. Creditors that have lower priority may not be able to collect. Furthermore, some assets will be exempt from being sold to pay debts, such as property protected by a homestead allowance or a family allowance, or property held in joint tenancy.

The personal representative generally is not personally liable for an estate's debts; however, there are a few situations in which this rule does not apply. If the personal representative cosigned for a loan or held a credit card jointly with the decedent, the personal representative may be personally liable for that debt. Or the personal representative may be liable for a debt if careless handling of the estate's assets caused them to lose value. (Justia.com, Paying Debts From an Estate & Legal Issues)

Managing Assets During Probate

The probate process can last for months or years, in some cases. As mentioned previously, the personal representative has a high level of responsibility during this time to prevent assets in the estate from being damaged or suffering a steep depreciation in value. The personal representative's fiduciary duty requires the personal representative to make decisions regarding the estate's assets based on the best interests of beneficiaries and creditors. Personal representatives must avoid actions that put their interests above the interests of the estate, such as lending themselves money from the estate or selling an estate asset to themselves, a member of their own family, or a friend. The personal representative must keep their own assets separate from estate assets and keep records of their actions and transactions performed on behalf of the estate. Also, the personal reprsentative should treat each beneficiary impartially and document all interactions with beneficiaries. Any investments should be especially prudent and conservative, even if the personal represeentative would invest their own money more aggressively. The goal is to prevent depletion of estate assets rather than maximizing gains. If the will provides specific instructions for a certain asset, the persobal representative will need to carry them out even if you disagree with them. Personal representatives who violate their duty may face legal action by beneficiaries or creditors, although they cannot be held accountable for a decline in asset value unless it resulted from their unreasonable actions.

Accounts for Managing Assets

Opening an account in the name of an estate or trust can be a helpful way to manage assets, deposit estate income, and pay bills, taxes, and probate costs. A simple checking account may be enough during the time that probate lasts. The personal representative will need to get a taxpayer ID number for the estate to open any type of account. The estate checking account can contain all of the funds from the decedent's bank accounts, as well as any income created by estate assets. The personal representative should keep records of each transaction involving the account.

Managing Real Property and Vehicles

If the decedent died leaving a home or vacation home, the personal representative will want to take security measures to protect the property if it is vacant. The personal representative must also keep up with maintenance, handle insurance and mortgage payments, and pay utilities and property taxes. In the event that the decedent was renting out a property that they owned, the personal representative should make sure that tenants continue to pay rent and comply with the lease terms; the personal reprsentative has the right to end a tenancy and possibly evict a tenant if problems arise.

Similarly, the prsonal reprsentative will need to keep up with any loan payments on vehicles in the estate, as well as handle maintenance and keep them safe. An insurance policy may not cover drivers of an estate's vehicle; however the estate and the personal representative may be able to be named as the insured on the policy. Generally, as with real estate, the personal representative should try to get vehicles transferred to their intended new owners efficiently.

Managing Money and Investments

Once the personal representative has opened a bank account for the estate, the decedent’s existing bank accounts should be closed and all funds transferred to the estate account. Check for automatic payments before closing the decedent’s account and establish a different method of payment.Stray cash that the personal representative finds when going through the decedent’s belongings should be placed in a sealed envelope in the presence of a witness. It should be signed and dated before being put in a safe place, which could include the estate account (depending on the terms of the decedent's will and/or state intestacy laws). The personal representative may also collect money owed to an estate from individuals or entities in debt to the estate (or the decedent) and deposit those funds into the estate account.

The personal representative should also review the decedent’s investment portfolio to identify any stocks that appear to be volatile. While the personal representative probably does not need to take any action regarding conservative, ordinary types of stocks, the personal representative may want to sell volatile stocks and put the money in safe investment types like government bonds or in the estate bank account. (Some examples of stocks that tend to be volatile include individual and small business stocks.) Any dividend checks or other income from investments, also should go into the estate bank account.

Managing Business Assets

While thepersonal representative probably should transfer or sell a business as soon as possible, the personal representative will be responsible for operating it in the meantime. This may require retaining someone else to operate it and getting help from other people who are already involved in running the business. However, the personal representative will be responsible for keeping up with business taxes and making sure that any money problems are addressed. If the decedent was involved in a distinctive form of business, such as a limited liability corporation (LLC) or a closely held corporation, the personal representative will need to research the governing documents of the business and state law for guidance on how to handle the decedent’s interest. In deciding whether to sell or close a business, the personal representative will need to follow the wishes of the decedent or, if those are unclear, the best interests of the beneficiaries.Selling Assets as a Personal Representative

The personal representative may want to sell property if it is depreciating rapidly and resulting in a loss to the estate or if the decedent left behind significant debts that need to be paid. Some wills authorize the personal representative to sell assets or pay creditors’ claims without court approval under the Independent Administration of Estates Act. The personal representative may also petition the court for independent administration, under which the probate process may be simplified. The personal representative will generally be able to sell assets, pay debts, and take other actions without court approval. Independent administration also often allows personal representatives to simply forward the inventory or accounting to interested parties instead of filing them with the court. The personal representative should consult the terms of any will as well as state law. The will or the law may specify certain types of assets that must be sold first to pay off debts. The personal representative also may need to get permission from the probate court or permission from a beneficiary to sell an asset, or may need to notify anyone with a potential interest in the asset before selling it, allowing time for an objection. Also, selling an asset may be inevitable if beneficiaries who have been left an asset to share do not want to share it.

Transferring Assets to Beneficiaries Early

Personal representatives may want to transfer certain assets to beneficiaries before the probate case closes. Sometimes beneficiaries are simply eager to receive their inheritances, but other times it makes financial sense to transfer the asset quickly. Assets like cars and real estate are at risk of damage or depreciation if they are not properly managed or maintained. Thus, transferring these assets to beneficiaries early decreases the risk that an asset will suffer as it sits in the estate. Assets without much value, such as common household items, may also be transferred early if the transfer will have no impact on the outcome of the probate case. The personal representative must make a reasonable effort not to exhibit favoritism, so the personal representative should clearly communicate why they are distributing some assets early if those distributions may appear biased.

The personal representative should guarantee that the estate can pay all of its debts and taxes before distributing any property to beneficiaries. The personal representative may also need to ask the court for permission before the transfer, and state law may limit the value of the assets that the personal representative may transfer early. (Justia.com, Managing Assets During Probate & an Executor's Legal Duties)

The Probate Inventory

Within the deadline set by the probate court (typically around 6 months after the probate was commenced), the personal representative must complete and file an Inventory detailing all of the probate assets. Items of property should be specifically described and the value of each item should also be determined, based on its fair market or appraised value. The personal representative must give a copy of the Inventory to the decedent's beneficiaries/heirs, but generally is not required to provide it to creditors.

With regard to real property owned by the decedent, the Inventory should include the address and a description of the property. Vehicle descriptions (including cars, boats, recreational vehicles, etc.) should include the year, make, model and VIN number. Other items of personal property such as firearms, electronics, and equipment should include serial numbers as part of the description. Financial accounts and cash should be specified to the penny and, where applicable, include the name of the financial institution holding the account, the account number, and the amount in the account at the time of the decedent's death. The personal representative may need to provide a copy of the death certificate and an affidavit to the bank to prove that they are entitled to this information.

Many people leave substantial amounts of stocks and bonds to their loved ones. The Inventory should include the number of shares of each type of stock, the name of the corporation, and the name of the exchange on which the stock is traded. Note the total gross amount of a bond, the name of the entity that issued it, the interest rate on the bond, and its maturity date. For U.S. savings bonds, include the serial number.

A decedent may have had intangible assets, such as a patent on an invention or a copyright on a book. The Inventory should include descriptions of any patents, copyright registrations, or contracts with businesses regarding intellectual property.

Sometimes a decedent dies while still being owed unpaid wages, commissions, and other benefits of employment. The inventory should estimate the amount that the decedent may have been owed from their employer. If they owned a business, the Inventory should note the name of the business and the type of form that it took, such as a partnership, an LLC, a corporation, or a sole proprietorship, as well as the ownership structure. If the decedent invested in a limited partnership, the personal representative should get a statement from the partnership on the value of the decedent's investment.

Similarly, sometimes a decdent dies before fully collecting on a loan made to someone else, or a judgment or settlement obtained in a legal action. The estate has the right to collect repayment on the loan or the proceeds of the judgment. The Inventory should describe any promissory notes or court documents indicating a verdict or settlement in the decedent's favor. (Justia.com, Taking Inventory of an Estate & Legal Considerations)

Winding Up the Estate Administration

While the probate is ongoing, it is important to document any and all transactions and transfers of property out of the estate. Each time a creditor receives payment or a beneficiary/heir receives cash or property, the recipient should be provided a receipt to sign as documentation of what the person has received. Items of property should be specifically described, including details such as Vehicle Identification Numbers, and serial numbers. Cash should be specified to the penny and, where applicable, include the source(s) of payment. The person receiving the item/payment should also be specifically identified by full legal name and address; typically, the person also signs the original receipt (and is provided with a copy).

After the period for making claims against the estate has expired and all claims and expenses having statutory priority have been paid, the personal representative is ready to distribute estate assets to the decedent's beneficiaries/heirs and close the estate. In Wisconsin, the personal representative must file a final Estate Account, which fully documents in detail all transactions of property and/or cash coming into the estate, being paid out of the estate, and the proposed distribution of remaining assets to beneficiaries/heirs. As with the Inventory and Receipts, detailed descriptions of property and its specific value must be included, as well as the specific portion (all, half, a percentage) proposed to be distributed to the specified beneficiary/heir. The personal representative must give a copy of the Estate Account to the decedent's beneficiaries/heirs; the final distribution of assets should not occur until the probate court has approved the proposed distribution.

The personal representative should also complete the Personal Representative's Statement to Close Estate; this document confirms that estate administration has been properly completed, all required documentation has been provided to persons entitled to receive copies, and all debts, liabilities, and fees (including attorney fees) have been paid. Six months after this form has been filed the personal representative's appointment terminates and the estate administration is considered fully and finally concluded.

Paralegal Roles

One of the paralegal's primary roles is assisting the personal representative with completing forms necessary to continue estate administration. In addition to the forms to be filed with the probate court, the paralegal may be asked to assist with completing IRS form SS-4 to request a Federal Tax ID number (EIN) for the estate. If ancillary probate is necessary, the paralegal will assist the attorney with determining the required process and completing forms/pleadings mandated by the ancillary state. The paralegal may also be requested to assist with arranging for the publication of notices in the official newspaper(s), corresponding with creditors and other persons filing claims against the estate, and assisting the personal representative with contacting insurance agents, appraisers, and other professionals needed for estate transactions.

The Estate Account is perhaps the most difficult, complex, and time-consuming form that must be filed. Paralegals are often responsible for ensuring accurate entry of all amounts received and paid by the estate, calculating amounts to be distributed to beneficiaries/heirs, and ensuring balancing totals for estate receipts and disbursements.

Index

Glossary

Sample Word 1 | Sample Definition 1

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    - 4.1: Basic Introduction to Non-Testamentary Estate Planning Documents - *CC BY 4.0*
    - 4.2: Basic Introduction to Trusts - *CC BY 4.0*
    - 4.3: Basic Introduction to Wills - *CC BY 4.0*
    - 4.4: Basic Introduction to Conditional Gifts - *CC BY 4.0*
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  - 5: Wills - *CC BY 4.0*
    - 5.1: Basic Introduction to Drafting Wills - *CC BY 4.0*
    - 5.2: Basic Introduction to Executing Wills - *CC BY 4.0*
  - 6: Probate - *CC BY 4.0*
    - 6.1: Basic Introduction to Probate - *CC BY 4.0*
    - 6.2: Basic Introduction to Personal Representatives - *CC BY 4.0*
    - 6.3: Basic Introduction to Informal Probate - *CC BY 4.0*
    - 6.4: Basic Introduction to Managing Probate Property - *CC BY 4.0*
  - Back Matter - *CC BY 4.0*
    - Index - *CC BY 4.0*
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    - 2.1: The Property System - *CC BY 4.0*
    - 2.2: Basic Introduction to Property Ownership and Interests - *CC BY 4.0*
    - 2.3: Basic Introduction to Estates in Real Property - *CC BY 4.0*
  - 3: Succession - *CC BY 4.0*
    - 3.1: Basic Introduction to Intestate Succession - *CC BY 4.0*
    - 3.2: Basic Introduction to Testate Succession - *CC BY 4.0*
    - 3.3: Basic Introduction to Succession in Wisconsin - *CC BY 4.0*
  - 4: Estate Planning Documents - *CC BY 4.0*
    - 4.1: Basic Introduction to Non-Testamentary Estate Planning Documents - *CC BY 4.0*
    - 4.2: Basic Introduction to Trusts - *CC BY 4.0*
    - 4.3: Basic Introduction to Wills - *CC BY 4.0*
    - 4.4: Basic Introduction to Conditional Gifts - *CC BY 4.0*
    - 4.5: Basic Introduction to Specialized Estate Planning Documents - *CC BY 4.0*
  - 5: Wills - *CC BY 4.0*
    - 5.1: Basic Introduction to Drafting Wills - *CC BY 4.0*
    - 5.2: Basic Introduction to Executing Wills - *CC BY 4.0*
  - 6: Probate - *CC BY 4.0*
    - 6.1: Basic Introduction to Probate - *CC BY 4.0*
    - 6.2: Basic Introduction to Personal Representatives - *CC BY 4.0*
    - 6.3: Basic Introduction to Informal Probate - *CC BY 4.0*
    - 6.4: Basic Introduction to Managing Probate Property - *CC BY 4.0*
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