Chapter 51

Wills and Trusts

INTRODUCTION

This chapter is concerned with the law related to wills and trusts. On death, title to a decedent's property must vest in someone. A decedent can direct the passage of property after death by will, subject to certain limitations imposed by the state. If no valid will has been executed, state law prescribes the distribution of property. If no heirs or kin can be found, the property escheats. Property can also be transferred through a trust. These are all part of estate planning, which can also involve the considerations in the section titled "Elder Law."

CHAPTER OUTLINE

I. Wills

The property of a person who dies intestate, and without heirs, passes to the state. A will must follow exactly the requirements of the appropriate state's statutes to be effective. Besides distributing property, a will can appoint a guardian and a personal representative.

A. TERMINOLOGY OF WILLS

- *Testator*—a person who makes a will.
- *Probate court*—a court that oversees the administration of a will.
- *Executor*—a person or party appointed by a testator in a will to administer the estate.

- *Administrator*—a person or party appointed by a court for a decedent who dies without a will to administer the estate.

B. LAWS GOVERNING WILLS

Although the Uniform Probate Code (UPC) has been adopted in about a third of the states, state laws vary widely

C. GIFTS BY WILL

1. Types of Gifts

- *Devise*—a gift of real estate by will.
- *Devisee*—the recipient of a devise.
- *Bequest or legacy*—a gift of personal property under a will.
- *Legatee*—the recipient of a legacy.

a. Specific

A specific devise or bequest (legacy) describes particular property.

b. General

A general devise or bequest (legacy) describes property generally—"all my land" or "$10,000," for example.

c. Residuary

The residuary (assets remaining after specific gifts have been made and debts paid) is distributed to the surviving spouse, descendants, or others.

2. Abatement

If the assets are insufficient to pay all general bequests, the legatees receive reduced benefits.

3. Lapsed Legacies

This occurs if a legatee dies before a legacy is paid.

D. REQUIREMENTS FOR A VALID WILL

1. Testamentary Capacity and Intent

A testator must be of legal age (usually eighteen) and sound mind—able to formulate and comprehend a plan for the disposition of property—when a will is made. A valid will represents the maker's intent. The testator must—

- Know the nature of the act of making a will.
- Comprehend and remember family and others for whom the testator has affection.
- Know the nature and extent of his or her property.
- Understand the distribution of assets called for by the will.

a. Undue Influence

If a decedent's plan of distribution was the result of improper pressure by another person overriding the maker's intent, the will is invalid. Undue influence may be inferred when relatives are overlooked in favor of a sole, nonrelative beneficiary who was in a position to influence the making of the will.

CASE SYNOPSIS—

Case 51.1: *In re Estate of Johnson*

Belton Johnson was married three times. He had three children from his first marriage, and eight grandchildren. While married to his second wife, he executed a will that provided for her during her lifetime and left the remainder of his estate in a trust for his grandchildren and children. When his second wife died, he changed the will to give each grandchild $1 million and the remainder to five charities. His children were provided for in a separate trust. While married to his third wife, Laura, he executed a will that left $1 million to each grandchild and the rest to Laura, and later a will that left his entire estate in trust to Laura for her life and then to a foundation that she controlled. After Johnson died, his attorney submitted the most recent will to probate. Johnson's children and grandchildren challenged it. A jury concluded that it was invalid due to Laura's undue influence. She appealed.

A state intermediate appellate court affirmed. Johnson was an admitted alcoholic with permanent cognitive defects and memory problems that would have caused him to be more susceptible to undue influence. Evidence suggested that Laura had exerted substantial control over many aspects of Johnson's life. Other evidence established that Johnson wanted to provide for his descendants, as well as for the charities named in the earlier will.

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Notes and Questions

Why would one heir (third wife Laura) seem loathe to share an estate with the other heirs (Johnson's children and grandchildren from a previous marriage)? The simplest and most obvious answer is greed. But there may have been personal friction between the parties to this case that are not revealed by the bare facts in the court's opinion.

ANSWER TO "WHAT IF THE FACTS WERE DIFFERENT?" QUESTION IN CASE 51.1

Suppose that Johnson, in his 1999 will, had specifically mentioned that it was his intention that his children and grandchildren would not receive any portion of his estate. Would that have changed the outcome? Why or why not? If Johnson had specifically stated in his 1999 will that he intended not to give any portion of his estate to his children and grandchildren, it would have been harder to prove that he lacked the required intent. In other words, it would have been clear that he intended to disinherit his natural heirs (his children and grandchildren). The plaintiffs could still have claimed that Johnson's wife, Laura, had subjected him to undue influence, but it might have been harder to convince the jury that the testator's mind was overpowered. Even someone who is an alcoholic and has an impaired memory would likely understand the consequences of explicitly stating in a will that the children and grandchildren take nothing.

ANSWER TO "THE ETHICAL DIMENSION" QUESTION IN CASE 51.1

There was no evidence presented to indicate that Johnson was intoxicated at the time he executed the will. So why did the court's analysis focus on the evidence of Johnson's alcoholism? The court focuses on the evidence of Johnson's alcoholism because it supports the notion that he was particularly susceptible to his wife's influence. It also indicates that his mental capacity might have been diminished (as the experts testified). When a court is reviewing a jury's verdict, it assesses the facts in the light most favorable to the jury's determination. As the court noted, "when reviewing a legal sufficiency or 'no evidence' challenge, we determine 'whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.'" Thus, the court looked at the facts concerning Johnson's on-going problems with alcohol to decide if the jury could reasonably have concluded that his mind had been overpowered by his wife at the time he signed the will. It also looked at Laura's testimony that Johnson had not had a drinking problem and the evidence that Johnson himself had admitted to his on-going drinking in 2000, a year before his death. Because a jury is free to decide the credibility of witnesses and to draw inferences from their testimony, the court found that the jury could reasonably have concluded that Laura was lying and that she had exerted undue influence. It did not matter to the court that there was no evidence that Johnson was drunk at the moment he signed the will, because undue influence often "involves an extended course of dealings and circumstances."

ADDITIONAL CASES ADDRESSING THIS ISSUE —

Recent cases determining **the testator's intent** include the following.

- *In re Estate of Wright*, 829 So.2d 1274 (Miss.App. 2002) (the testator's nephew was the intended beneficiary of the settlement proceeds of a lawsuit initiated by the testator, who, when she made her will, was aware of the occurrence on her property that precipitated the suit and bequeathed her interest in the property to the nephew without amending the will to direct any payments in the suit to someone other than the nephew).

- *Painter v. Coleman,* 211 W.Va. 451, 566 S.E.2d 588 (2002) (rejecting the language in a will was necessary to give effect to the testator's intent when a spouse deleted a clause that would have devised her estate to her spouse in case of their simultaneous deaths—the other spouse had already died—and that deletion would have forced the entire estate to pass intestate, which was not the surviving spouse's intent).

b. Disinheritance
A testator is not required to give property to his or her family. But laws protect minors from the loss of a residence, and most states prevent accidental disinheritance.

2. Writing
A written document is generally required, though it can be informal. In some cases, an oral will, such as a nuncupative will, is valid, particularly if made during the last illness of the testator.

CASE SYNOPSIS—

Case 51.2: *In re Estate of Melton*

William Melton's will stated that his daughter Vicki Palm was to receive nothing. A handwritten note in the will stated that Melton's friend Alberta Kelleher was to receive a portion of his estate. In a later letter to Kelleher, Melton wrote that he wanted to leave his entire estate to her and nothing to any of his relatives. When Melton died, Kelleher had already passed. The state of Nevada argued that it should receive his entire estate because Palm, his only surviving natural heir, had been disinherited. The court gave the estate to Palm under the state's intestacy laws. The state appealed.

The Nevada Supreme Court reversed. The disinheritance clause was enforceable. To apply a disinheritance clause, the common law required either the disposition of the entire estate by will or an heir eligible to receive any intestate property. Neither existed here—Melton had disinherited the sole heir and his will distributed only a portion of his estate. But Nevada defines a will to include a "testamentary instrument that merely . . . excludes or limits the right of an individual . . . to succeed to property of the decedent passing by intestate succession." Thus, Melton could disinherit his heir without giving his property to someone else. Under that circumstance, the state was entitled to his property.

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Notes and Questions

What might Melton have done so that the litigation in this case would have been avoided? Possibly nothing—there may have been a challenge to his testamentary scheme regardless. But he might have left a small portion of his estate to his daughter, or another relative, and more fully expressed an intent for the residuum to pass to the state, Kelleher's descendants, or some worthy charity, rather than to have left the outcome open.

How might the availability of a secure online repository for a person's will affect a challenge to the will? A copy of a will might be produced more easily if it were deposited in an electronic database that could be accessed online. Whether a court would accept it as authentic is another question. The kind of proof that could be required to validate an online copy would be different from the proof needed to prove a paper copy. The testator's e-signature would be in a different form (even a copy of the original would be electronic). These and other factors in such circumstances could make it easier to challenge and easier to propound a will.

ANSWER TO "THE LEGAL ENVIRONMENT DIMENSION" QUESTION IN CASE 51.2

Based on the facts presented here, did Melton have testamentary intent when he wrote his letter? Why or why not? Melton probably had testamentary intent because he intended to transfer and distribute his property. In his letter, Melton said that he wanted Kelleher to receive his entire estate and that he wanted his family to receive nothing. Melton had also just returned from the funeral of his mother, who had died in an auto accident. Melton apparently intended to create a will in case he also died suddenly.

ANSWER TO "THE ETHICAL DIMENSION" QUESTION IN CASE 51.2

Why do most states have strict requirements for the execution of a valid will? How did Nevada's requirements affect the outcome in Melton's case? Strict standards for the execution of valid wills in most states have been motivated by a desire to thwart fraud, undue influence, and other wrongdoing. And once a testator has died (or become incompetent), it is of course not possible to determine the testator's intent with respect to an estate by asking him or her. Strict requirements support the presumption that a document in compliance with those requirements gives effect to the testator's intent as it was when the document was written, witnessed, and signed.

In Melton's case, Nevada's will requirements gave effect to the testator's expressed intent by disinheriting his sole natural heir and distributing a certain portion of his estate to a designated heir. Because Melton did not give the rest of his property to someone else, the state inherited it.

3. Signature
If a will is in writing, the testator must sign it. Intent is the key as to whether a particular mark is a signature.

4. Witnesses

- Two, and sometimes three, witnesses are required. Their qualifications and the manner in which witnessing must be done varies. Some states prohibit interested parties from witnessing. A witness does not have to read the will.
- Sometimes, witnesses must sign in the sight or presence of each other, but the UPC requires only that the testator acknowledge his or her signature to the witnesses [UPC 2–502].

ADDITIONAL BACKGROUND—

Harmless Errors under the UPC

To allow a probate court to excuse a **harmless error** in complying with the technical requirements for executing or revoking a will, the UPC was revised in 1990. The following is the section that reflects that revision.

ARTICLE II. INTESTACY, WILLS, AND DONATIVE TRANSFERS (1990)
PART 5. WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

§ 2–503. Writings Intended as Wills, etc.

Although a document or writing added upon a document was not executed in compliance with Section 2–502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an

addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

E. REVOCATION OF WILLS

1. Revocation by a Physical Act of the Maker

A testator may revoke a will by intentionally burning, tearing, canceling, obliterating, or destroying it or by having someone else do so in the presence of the maker and at the maker's direction. In some states, partial revocation is recognized. Of course, where provided, statutorily prescribed methods must be followed precisely.

CASE SYNOPSIS—

Case 51.3: *Peterson v. Harrell*

Marion Peterson executed a will that contained a bequest to Vasta Lucas in the form of a trust. On Lucas's death, the trustee was to distribute the assets to four beneficiaries, including Peterson's brother and sister, Arvin and Carolyn (caveators). Later, without witnesses, Peterson crossed out the beneficiaries' names, but left the bequest to Lucas intact. After Peterson's death, the will was admitted to probate. The caveators appealed, contending that the will had been revoked.

The Georgia Supreme Court affirmed. To prove the revocation of a will by physical act, the caveators must show that the act was committed with the intent. Here, the will was clearly altered, but "caveators had no knowledge of the circumstances surrounding what they allege to be the revocation of the will, . . . testator never discussed revoking her will with caveators, and . . . caveators were not present when testator made the alterations to the will." Apparently, too, Peterson intended to cancel only a portion of the will, not the entire will—Peterson's alterations left the bequest to Lucas intact.

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Notes and Questions

Can a will be revoked at any time? Yes. An executed will is revocable by the maker at any time during the maker's lifetime. Wills can also be revoked by operation of law. Revocation can be partial or complete, but the revocation itself must follow certain strict formalities in order to be effective.

ANSWERS TO LEGAL REASONING QUESTIONS AT THE END OF CASE 51.3

1. ***Why would the caveators argue that the entire will should be revoked? How would the will's revocation benefit them?*** Clearly, if the will were only partially revoked, the caveators would take nothing. They were among Lucas's successor beneficiaries whose names had been crossed out by the testator. In other words, if the will were only partially revoked, Lucas would take the entire estate, and if she died, the estate would pass to her beneficiaries—not to the caveators. If the entire will was revoked, however, then

Marion Peterson would be deemed to have died intestate—without a valid will. In this situation, the caveators, as siblings of the testator, might inherit part or all of the estate (depending on whether there other beneficiaries who might inherit under intestacy laws).

2. *What could the testator have done differently to clarify her intentions in her will?* The testator could have revoked her will totally or partially by a codicil, which is a written instrument separate from the will that amends or revokes provisions in the will. If the testator only wanted to change the successor beneficiaries' names (or remove any successor beneficiaries from the will), a simple amendment to the will to this effect would have made her intention clear to the court.

3. *Suppose that shortly before Peterson's death, she had asked Lucas to tear up her will, and Lucas had done it. Would the result have been different?* Yes, if, shortly before Peterson's death, she had asked Lucas to tear up her will, and Lucas had done it, the result in this case would have been different. A testator may revoke a will by having someone tear it up at her direction. In that circumstance, the will's proponents would not be able to prove that it existed at the time of the testator's death or that it was destroyed without his or her consent.

In the *Peterson* case, other evidence might have been considered if Lucas had torn up Peterson's will at her direction, however. For example, the court might have heard testimony concerning Peterson's capacity, which might have influenced the destruction of the will and the court's decision.

4. *How might the availability of a secure online repository for a person's will affect a challenge to the will?* A copy of a will might be produced more easily if it were deposited in an electronic database that could be accessed online. This could certainly affect the outcome in a case in which the will could not otherwise be found. Or if a paper copy had been destroyed, or was otherwise missing, the existence of an e-copy might support a finding that the testator had not intended to revoke the will by destruction.

Whether a court would accept an e-copy as authentic is another question. The kind of proof that could be required to validate an online copy would be different from the proof needed to prove a paper copy. The testator's e-signature would be in a different form (even a copy of the original would be electronic). These and other factors in such a circumstance could make it easier to challenge and easier to propound a will.

2. Revocation by a Subsequent Writing

A codicil can amend or revoke provisions in a will. A new will may (or may not) revoke a prior will, depending on the language (the text provides an example). If an express declaration of revocation is missing, the wills are read together; if there are inconsistent dispositions, the second will controls.

3. Revocation by Operation of Law

a. Marriage and Divorce

A marriage, divorce, or annulment, after a will has been executed generally revokes the will (at least as regards the new spouse or ex-spouse). Generally, a new spouse gets an intestate share, and an ex-spouse gets nothing. Exceptions include—

- A provision in the will that covers the new spouse.
- A prenuptial agreement.

b. Children

The birth of children after a will has been executed generally revokes the will (at least as regards the new children). Generally, unless the will clearly indicates that the testator intended to disinherit the new children, they get intestate shares.

F. RIGHTS UNDER A WILL

There are limits on the way a person can dispose of property in a will, providing a spouse's elective share as an example. State statutes provide methods by which a surviving spouse can renounce his or her gift by will and take an elective share (to obtain whichever is most advantageous).

ADDITIONAL BACKGROUND—

Elective Share under the Revised UPC

The following is the section of the revised (1990) UPC that adjusted the amount of a surviving spouse's **elective share** to relate to the number of years that he or she had been married to the decedent.

ARTICLE II. INTESTACY, WILLS, AND DONATIVE TRANSFERS (1990)
PART 2. ELECTIVE SHARE OF SURVIVING SPOUSE

§ 2–202. Elective Share.

(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other:	The elective-share percentage is:
Less than 1 year	Supplemental Amount Only.
1 year but less than 2 years	3% of the augmented estate.
2 years but less than 3 years	6% of the augmented estate.
3 years but less than 4 years	9% of the augmented estate.
4 years but less than 5 years	12% of the augmented estate.
5 years but less than 6 years	15% of the augmented estate.
6 years but less than 7 years	18% of the augmented estate.
7 years but less than 8 years	21% of the augmented estate.
8 years but less than 9 years	24% of the augmented estate.
9 years but less than 10 years	27% of the augmented estate.
10 years but less than 11 years	30% of the augmented estate.
11 years but less than 12 years	34% of the augmented estate.
12 years but less than 13 years	38% of the augmented estate.
13 years but less than 14 years	42% of the augmented estate.
14 years but less than 15 years	46% of the augmented estate.
15 years or more	50% of the augmented estate.

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2–207, 2–209(a)(1), and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under Section 2–209(b) and (c) is less than [$50,000], the surviving spouse is

entitled to a supplemental elective-share amount equal to [$50,000], minus the sum of the amounts described in those sections. The supplemental elective- share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Section 2–209(b) and (c).

(c) [Effect of Election on Statutory Benefits.] If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

(d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

G. PROBATE PROCEDURES

1. Informal Probate

The assets of small estates can often be distributed without formal probate. Title to cars, bank accounts, and other property can often be passed merely by filling out forms, particularly when held in joint tenancy or there is only one heir. Once a will is admitted to probate, family members can settle among themselves the distribution of a decedent's assets, although a court order is needed to protect the estate from future creditors and to clear title.

2. Formal Probate

For large estates, or when trusts are set up by will, formal probate is required. A court supervises every aspect of the settlement. The process can be long and expensive, depending on such factors as the types of assets, applicable tax laws, size of the estate, and other things.

ADDITIONAL BACKGROUND—

Estate Administration

The orderly procedure used to collect assets, settle debts, and distribute the remaining assets when a person dies is the subject matter of **estate administration**. The rules and procedures for managing the estate of a deceased are controlled by statute and, consequently, vary from state to state. In every state, there is a special court, often called a probate court, that oversees the management of estates of decedents.

Is There a Will? The first step after a person dies is usually to determine whether or not the decedent left a will. In most cases, the decedent's attorney will have that information. If there is uncertainty as to whether a valid will exists, the personal papers of the deceased must be reviewed. If a will exists, it probably names a personal representative (executor) to administer the estate. If there is no will, or if the will fails to name a personal representative, then the court must appoint an administrator. Under the UPC, the term personal representative refers to either an executor (person named in the will) or an administrator (person appointed by the court) [UPC 1-201(30)].

Personal Representative's Duties. The personal representative has a number of duties. His or her first duty is to inventory and collect the assets of the decedent. If necessary, the assets are appraised to

determine their value. Both the rights of creditors and the rights of beneficiaries must be protected during the estate administration proceedings. In addition, the personal representative is responsible for managing the assets of the estate during the administration period and for not allowing them to be wasted or unnecessarily depleted.

The personal representative receives and pays valid claims of creditors and arranges for the estate to pay federal and state income taxes and estate taxes (or inheritance taxes, depending on the state). A personal representative is required to post a bond to ensure honest and faithful performance. Usually, the bond exceeds the estimated value of the personal estate of the decedent. Under most state statutes, the will can specify that the personal representative need not post a bond.

When the ultimate distribution of assets to the beneficiaries is determined, the personal representative is responsible for distributing the estate pursuant to the court order. Once the assets have been distributed, an accounting is rendered to the court, the estate is closed, and the personal representative is relieved of any further responsibility or liability for the estate.

Estate Taxes. The death of an individual may result in tax liabilities at both the federal and state levels. At the federal level, a tax is levied on the total value of the estate after debts and expenses for administration have been deducted and after various exemptions have been allowed. The tax is on the estate rather than on the beneficiaries. Therefore, it does not depend on the character of any bequests or on the relationship of the beneficiary to the decedent, unless a gift to charity that is recognized by the Internal Revenue Service as deductible from the total estate for tax purposes is involved. Estate planning for larger estates also considers other deductions available under federal law. An entire estate can pass free of estate tax if the estate is left to the surviving spouse.

The majority of states assess a death tax in the form of an inheritance tax imposed on the recipient of a bequest rather than on the estate. Some states also have a state estate tax similar to the federal estate tax. In general, inheritance tax rates are graduated according to the type of relationship between the beneficiary and decedent. The lowest rates and largest exemptions are applied to a surviving spouse and the children of the decedent.

H. PROPERTY TRANSFERS OUTSIDE THE PROBATE PROCESS

These include living trusts, joint ownership of property, gifts while one is still living, and life insurance.

II. Intestacy Laws

Intestacy statutes set out rules and priorities under which “natural” heirs inherit property (after estate debts are paid). The rules vary widely from state to state.

A. SURVIVING SPOUSE AND CHILDREN

A surviving spouse is usually entitled to a share of an estate—the entire estate if there are no children or grandchildren, one-half if there is one surviving child, and one-third if there are two or more children.

B. WHEN THERE IS NO SURVIVING SPOUSE OR CHILD

If there is no surviving spouse or child, an estate passes to lineal descendants (in the order of grandchildren and parents) or, if none, collateral heirs (brothers and sisters, nieces, nephews, aunts, and uncles).

C. STEPCHILDREN, ADOPTED CHILDREN, AND ILLEGITIMATE CHILDREN

Legally adopted children are heirs; stepchildren are not. In most stares, any child born of a union that has the characteristics of a formal marriage is legitimate. An illegitimate child's Inheritance rights may differ from those of a legitimate child).

ENHANCING YOUR LECTURE—

TRIMBLE V. GORDON (1977)

At common law, an illegitimate child was regarded as a *filius nullius* (Latin for "child of no one") and had no right to inherit. Over time, this attitude has changed. In 1977, the United States Supreme Court decided a landmark case establishing the rights of illegitimate children in the United States. In *Trimble v. Gordon,*[a] an illegitimate child sought to inherit property from her deceased natural father on the ground that an Illinois statute prohibiting inheritance by illegitimate children in the absence of a will was unconstitutional.

THE ILLINOIS LAW

The child was Deta Mona Trimble, daughter of Jessie Trimble and Sherman Gordon. The paternity of the father had been established before a Cook County, Illinois, circuit court in 1973. Gordon died intestate in 1974. The mother filed a petition on behalf of the child in the probate division of the county circuit court; the court denied the petition on the basis of an Illinois law disallowing the child's inheritance because she was illegitimate. Had she been legitimate, she would have been her father's sole heir. In 1975, the Illinois Supreme Court affirmed the petition's dismissal.

THE SUPREME COURT INVALIDATES THE ILLINOIS LAW

When the case came before the United States Supreme Court in 1977, the Court acknowledged that the "judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area . . . [a]nd the need for the States to draw 'arbitrary lines . . . to facilitate potentially difficult problems of proof.' " The Court held that the section of the Illinois Probate Act that prohibited Deta Mona Trimble from inheriting her father's property was unconstitutional because it "cannot be squared with the command of the Equal Protection Clause of the Fourteenth Amendment." The Court "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."

APPLICATION TO TODAY'S WORLD

This is a landmark case in the law because it represents a significant step toward equal rights for children. By declaring the Illinois statute unconstitutional, the Court invalidated similar laws in several other states. That does not mean, however, that all illegitimate children now have inheritance rights identical to those of legitimate children. Those state statutes that discriminate between the two classes for legitimate state purposes have thus far been allowed to stand, in the interest of recognizing each state's need to create an appropriate legal framework for the disposition of property at death.[b]

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a. 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

b. UPC 2–109; *White v. Randolph,* 59 Ohio St.2d 6, 391 N.E.2d 333 (1979).

D. GRANDCHILDREN

1. *Per Stirpes* Distribution

Per stirpes is a method of dividing an intestate share by which a class or group of distributees (for example, grandchildren) take the share that their deceased parent would have been entitled to inherit had that parent lived.

2. *Per Capita* Distribution

An estate may also be distributed on a *per capita* basis, which means that each person takes an equal share of the estate.

III. Trusts

A trust involves any arrangement by which legal title to property is transferred from one person to be administered by a trustee for another person's benefit. The elements of a valid trust are—

- A designated beneficiary.
- A designated trustee.
- A fund identified to enable title to pass to the trustee.
- Delivery by the settlor or grantor to the trustee with the intent of passing title.

A. EXPRESS TRUSTS

1. Living Trusts

A grantor executes a living trust during his or her lifetime.

a. Revocable Living Trusts

A living trust can be revocable, in which the grantor retains control over the property and must pay taxes on it).

b. Irrevocable Living Trusts

A living trust can be irrevocable, in which the grantor gives up control and does not pay the taxes.

2. Testamentary Trusts

A testamentary trust is created by will on the settlor's death.

3. Charitable Trusts

A charitable trust (designed to benefit part of all of the public) must be created for a charitable, educational, religious, or scientific purpose.

4. Spendthrift Trusts

A spendthrift trust prevents a beneficiary's using trust funds improvidentially by limiting the beneficiary's draw on trust funds and transfer of the right to future payments.

5. Totten Trusts

This trust is created when a person deposits money in his or her name in trust for another. It is revocable at will until the gift is completed or the grantor dies.

B. IMPLIED TRUSTS

1. Constructive Trusts

A constructive trust is an equitable remedy that enables plaintiffs to recover property (and sometimes damages) from defendants who would otherwise be unjustly enriched. The text provides examples.

2. Resulting Trusts

A resulting trust arises from the conduct of the parties.

C. THE TRUSTEE

Anyone legally capable of holding title to, and dealing in, property can be a trustee. If a settlor fails to name a trustee, or if a named trustee cannot or will not serve, a court can appoint a trustee.

1. Trustee's Duties

A trustee must act with honesty, good faith, and prudence, and exercise loyalty toward the beneficiary. A trustee must—

- Keep clear, accurate accounts.
- Furnish complete information to the beneficiary.
- Keep trust assets separate.
- Pay an income beneficiary the net income of the trust.
- Distribute the risk of loss of the trust assets through diversified "prudent investments."

2. Trustee's Powers

A settlor may prescribe the trustee's powers and performance. State law applies only in the absence of such terms. When state law otherwise applies, it may restrict the trustee's investment of funds to conservative debt securities. A settlor often grants a trustee discretionary investment power. In that circumstance, any statute may be considered only advisory, with the trustee's decisions subject in most states to the prudent person rule.

3. Allocations between Principal and Income

A settlor may provide one beneficiary with a life estate and another beneficiary with the remainder interest in a trust. Questions may arise concerning the apportionment of receipts and expenses between income and principal. Absent terms in the trust to the contrary, state law provides that ordinary receipts and expenses are chargeable to an income beneficiary, and extraordinary receipts and expenses are allocated to a principal beneficiary.

D. TRUST TERMINATION

A trust terminates when it says it does, when its terms have been fulfilled, or when it is impossible to continue.

ADDITIONAL BACKGROUND—

The Trustee's Discretion

A difficult question concerns the extent to which a trustee has the discretion to "invade" the principal and distribute it to an income beneficiary—if the income is found to be insufficient to provide for the beneficiary in

an appropriate manner. A similar question concerns the extent of a trustee's discretion to retain trust income and add it to the principal, if the income is found to be more than sufficient to provide for the beneficiary in an appropriate manner.

Generally, the income beneficiary should be provided with a somewhat predictable annual income, but with a view to preserving the principal. A trustee may therefore make individualized adjustments in annual distributions.

IV. Other Estate-Planning Issues

In anticipation of becoming incapacitated or otherwise unable to act, persons sometimes plan for others to manage their affairs.

ANSWER TO CRITICAL THINKING QUESTION IN THE FEATURE— INSIGHT INTO SOCIAL MEDIA

Why might an online executor need a copy of the deceased's death certificate? In order to close Web sites, blogs and social media accounts, your online executor may be required to show proof that you have died.

A. POWER OF ATTORNEY

A power of attorney authorizes a person to act on another's behalf, sometimes for limited purposes (see Chapter 33).

1. Durable Power of Attorney

A durable power of attorney authorizes a person to act on behalf of an incompetent person when he or she becomes incapacitated.

2. Health-Care Power of Attorney

A health-care power of attorney designates a person to choose medical treatment for a person who is unable to make such a choice.

B. LIVING WILL

A living will is an advance health directive that designates whether or not a person wants certain life-saving procedures to be taken if they will not result in a reasonable quality of life.

TEACHING SUGGESTIONS

1. Ask students if they have ever made a will. ***What were some of the concerns that prompted them to make a will? Do single persons without children need a will?***

2. Ask students to discuss why the requirements for executing valid wills are so strict in most states. ***Are***

these standards prompted by fears of fraud? Should these standards be relaxed so that those who fail, for one reason or another, to comply with a particular statutory requirement, will not have their wills invalidated?

3. Ask students to discuss the various techniques for estate planning—which are most advantageous in what types of situations—and to put together estate plans of their own. This could help underscore that estate plans must be continually reviewed and revised to be sure they meet the needs of those for whom they are designed. ***What circumstances, other than divorce, could affect who takes what under a will, or by some other estate planning technique? Are taxes the only consideration?***

4. Bring to class various will forms, trust forms, and forms for the documents discussed in the elder law section, and discuss their provisions and effects, particularly in your jurisdiction.

Cyberlaw Link

What effect might the Web have on the uniformity of wills and other estate planning documents discussed in this chapter? How might the existence of the Internet affect the management of a trust?

DISCUSSION QUESTIONS

1. ***What is a will?*** A will is the final declaration of the disposition that a person desires to have made of his or her property after death. A will is referred to as a testamentary disposition of property. It is a formal instrument that must follow exactly the requirements of the appropriate state's statutes to be effective. A will becomes effective only upon the death of the testator.

2. ***How does a specific devise or bequest differ from a general devise or bequest?*** A specific devise describes particular property—such as a gold watch or a diamond ring—that can be distinguished from all the rest of the testator's property. If the particular item is not in the testator's estate at the time of his or her death, the devise will be extinguished or canceled. A general devise, by contrast, does not single out any particular item of property to be transferred by will but usually consists of a sum of money.

3. ***What is the purpose of a residuary clause?*** A will may provide that any assets remaining after specific gifts are made and debts are paid are to be distributed through a residuary clause. Such a clause is used because the exact amount to be distributed cannot be determined until all other gifts and payouts are made. Problems can arise, however, when the will does not specifically name the beneficiaries to receive the residue. If it is impossible for the court to determine the intentions of the testator, the residue will pass according to state laws of intestacy.

4. ***What are the three requirements that must be satisfied in order for a testator to demonstrate his or her testamentary capacity?*** The testator must (1) comprehend and remember the "natural objects of his or her bounty" (usually family members and persons for whom the testator has affection); (2) comprehend the kind and character of the property being distributed; and (3) understand and formulate a plan for disposing of the property.

5. ***What are the four basic requirements for a valid will?*** A will (1) must be in writing; (2) signed by the testator; (3) witnessed by two or three witnesses; and (4) published (declared by the testator to the witnesses that the document they are about to sign is his or her "last will and testament").

6. ***What is a codicil?*** A codicil is a written instrument separate from the will that amends or revokes provisions in the will. It eliminates the necessity of redrafting an entire will merely to add to it or amend it. A codicil can also be used to revoke an entire will. The codicil must be executed with the same formalities required for a will and must expressly refer to the will.

7. ***What four elements must be present to create a valid trust?*** A valid trust must include (1) a designated beneficiary; (2) a designated trustee; (3) a fund sufficiently identified to enable title to pass to the trustee; and (4) actual delivery of the property to the trustee with the intention of passing title.

8. ***How does a living trust differ from a testamentary trust?*** A living trust is a trust executed by a grantor during his or her lifetime. The grantor executes a "trust deed," and legal title to the trust property passes to the named trustee. The trustee has a duty to administer the property as directed by the grantor for the benefit and in the interest of the beneficiaries. A testamentary trust, by contrast, is a trust created by will to come into existence upon the settlor's death. Although a testamentary trust has a trustee who maintains legal title to the trust property, the actions of the trustee are subject to judicial approval. If the will setting up a testamentary trust is invalid, then the trust will also be invalid and the designated trust property will then pass according to intestacy laws.

9. ***What is a constructive trust?*** A constructive trust arises by operation of law as an equitable remedy that enables plaintiffs to recover property (and sometimes damages) from defendants who would otherwise be unjustly enriched. The legal owner of the property is declared to be a trustee for the parties who, in equity, are actually entitled to the beneficial enjoyment that flows from the trust.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Ask each student to draft a will for himself or herself disposing of any property he or she may own. ***What sorts of problems does drafting a will present in terms of deciding who should receive what property?***

2. Ask students to draft their own durable powers of attorney, health-care powers of attorney, or living wills. ***What terms would they want to include?*** You might pass out standard versions of these forms and ask students what they would change.

REVIEWING—

WILLS AND TRUSTS

In June 2013, Bernard Ramish set up a $48,000 trust fund through West Plains Credit Union to provide tuition for his nephew Nathan Covacek to attend Tri-State Polytechnic Institute. The trust was established under Ramish's control and went into effect that August. In December, Ramish suffered a brain aneurysm that caused frequent, severe headaches but no other symptoms. In August 2014, Ramish developed heat stroke and collapsed on the golf course at La Prima Country Club. After recuperating at the clubhouse, Ramish quickly wrote his will on the back of a wine list. It stated, "My last will and testament: Upon my death, I give all of my personal property to my friend Steve Eshom and my home to Lizzie Johansen." He signed the will at the bottom in the presence of five men in the La Prima clubhouse, and all five men signed as witnesses. A

week later, Ramish suffered a second aneurysm and died in his sleep. He was survived by his mother (Dorris Ramish); his son-in-law (Bruce Lupin); and his granddaughter (Tori Lupin). Ask your students to answer the following questions, using the information presented in the chapter.

1. ***What type of trust did Ramish create for the benefit of Covacek? Was it revocable or irrevocable?*** Based on the information it appears to be a revocable living trust or *inter vivos* trust as it remained under Ramish's control.

2. ***Would Ramish's testament on the back of the wine list meet the requirement for a valid will? Why or why not?*** Ramish's will meets all the requirements, which concern (1) the testator's capacity, (2) the will's form, (3) the testator's signature, (4) the will's witnesses, and (5) the will's publication. As is generally required, Ramish's will was in writing, albeit his own handwriting (which makes it holographic). Additionally, Ramish signed the will before five witnesses, who also signed it. Publication is becoming an unnecessary formality in most states and is not required by the UPC. Nevertheless, one can probably assume that Ramish made an oral declaration to the witnesses that the document was his last will and testament. As for capacity, a testator must be of legal age and sound mind when a will is made. An aneurysm and heat stroke could affect an individual's mental function, but the problem states that Ramish had "headaches but no other symptoms," indicating that he was of sound mind. Another aspect of this requirement, however, is that the testator remember in the will the "natural objects of his bounty"—i.e., family members or others for whom he or she has affection. On this account, Ramish's gifts to "my friend" Eshom and Johansen may not alone call the will into question—the facts do not establish the relationship among these parties—but Ramish's failure to acknowledge his mother, son-in-law, and granddaughter possibly would.

3. ***What would the order of inheritance have been if Ramish had died intestate?*** Intestacy laws vary widely from state to state, but generally, if an individual dies without a will and has no spouse or surviving child, then, in order, lineal descendants (grandchildren, brothers, and sisters, and—in some states—parents of the decedent) inherit. If there are no lineal descendants, then collateral heirs (nieces, nephews, aunts, and uncles of the decedent) inherit. Here, that order would dictate that Ramish's granddaughter would inherit his estate.

4. ***Was Johansen granted a durable power of attorney or a health-care power of attorney for Ramish? Explain. Had Ramish created a living will?*** It appears that Ramish gave a health-care power of attorney, which put Johansen in charge of choosing his medical treatment should he be incapable of making decisions. A living will sets out specific medical procedures that will be taken in the event of incapacity.

DEBATE THIS:

Any changes to existing, fully witnessed wills should also have to be witnessed. If a will requires witnesses to be valid, so, too, should any changes to that will. Otherwise, there are too many chances for fraud by those close to the testator.

A testator should have power to make changes to her or his will without the benefit of witnesses. Such unwitnessed changes should not invalidate the will.

EXAMPREP—

ISSUE SPOTTERS

1. ***Sheila makes out a will, leaving her property in equal thirds to Toby and Umeko, her children, and Velda, her niece. Two years later, Sheila is adjudged mentally in competent, and that same year, she dies. Can Toby and Umeko have Sheila's will revoked on the ground that she did not have the capacity to make a will? Why or why not?*** . No. To have testamentary capacity, a testator must be of legal age and sound mind *at the time the will is made.* Generally, the testator must (1) know the nature of the act, (2) comprehend and remember the "natural objects of his or her bounty," (3) know the nature and extent of her or his property, and (4) understand the distribution of assets called for by the will. In this situation, Sheila had testamentary capacity at the time she made the will. The fact that she was ruled mentally incompetent two years after making the will does not provide sufficient grounds to revoke it.

2. ***Ralph dies without having made a will. He is survived by many relatives—a spouse, children, adopted children, sisters, brothers, uncles, aunts, cousins, nephews, and nieces. What determines who gets what?*** The estate will pass according to the state's intestacy laws. Intestacy laws set out how property is distributed when a person dies without a will. Their purpose is to carry out the likely intent of the decedent. The laws determine which of the deceased's natural heirs (including, in this order, the surviving spouse, second lineal descendants, third parents, and finally collateral heirs) inherit his or her property.