

# WILLS

- **Will:** An instrument a *testator* prepares, or has prepared, directing how to distribute her property after she dies.
  
- **Executor:** A person appointed by the testator in her will to see that the will is administered and the testator's property is disposed of as the testator wished.
  
- **Administrator:** A person appointed by a (probate) court to handle the disposition of an intestate's property or to handle the disposition of a testator's property if the executor named by the testator cannot serve.
  
- **Contingent Upon Death:** No interest in the testator's property passes under the will prior to the testator's death.

# TESTAMENTARY GIFTS

- **Devise:** A gift of real property.
- **Bequest/Legacy:** A gift of personal property.
  - A devise or bequest may be *specific* (e.g., I leave the my 2005 BMW to my nephew, Eustace), *general* (e.g., I leave all of my land to my niece, Gertrude), or *residuary* (e.g., I leave the rest of my estate for the enjoyment and support of my beloved dachshund, Frank).
- **Abatement:** If the estate's assets are insufficient to pay all bequests in full, each bequest is reduced proportionally – unless the will specifically provides otherwise.
- **Lapse:** If a beneficiary predeceases the testator, or dies before the devise or bequest is payable, the intended gift may pass to that beneficiary's heirs, may revert to the testator's estate, or may be divided among the testator's surviving beneficiaries when the devise or bequest becomes payable.
- **Disclaimer:** A beneficiary can renounce her share of the property under a will.
  - If the beneficiary is a surviving spouse or is otherwise entitled to a statutory share of the testator's estate, he may elect that share in lieu of the gift by will.

# WILLS: REQUISITES FOR VALIDITY

- **Testamentary Capacity:** The testator must be of legal age and sound mind at the time he makes the will. Generally, a testator who is of legal age must:
  - (1) **intend** the document to be his last will,
  - (2) **comprehend** the kind and character of the property being distributed by the will, and
  - (3) comprehend and **remember** the “natural objects of his bounty” (*i.e.*, the intended beneficiaries).
  
- **Writing Requirement:** Generally, a will must be written.
  - **Holographic Will:** A will that is completely handwritten.
  - **Nuncupative Will:** An oral will made and declared before witnesses (*e.g.*, a “deathbed will”).
  
- **Other Formalities:** The testator’s **signature** must appear on the face of the will – and, in the case of non-holographic wills, must be **declared** before and signed by **witnesses**.

## WILLS: REVOCATION

- A testator may revoke her will at any time before her death by:
  - (1) **Physical Act:** intentionally burning, tearing, canceling, obliterating, or otherwise destroying the will or directing another to do so in the testator's presence;
  - (2) **Subsequent Writing:** intentionally making a new will, or by amending or revoking any or all of a will by means of a *codicil*; or
  - (3) **Operation of Law:** due to marriage, divorce, or annulment, or the birth of one or more children after the will was executed.

# PROBATE PROCESS

- **Probate:** The legal process required to establish the validity of a will and to administer the decedent's estate.
  
- **Informal Probate:** Most states allow the assets of smaller estates to be distributed without formal probate proceedings.
  - **Family Settlement Agreements:** A majority of states permit the beneficiaries of an estate to agree among themselves, subject to court approval, how the assets will be distributed.
  
- **Formal Probate:** For larger estates and for smaller estates that require the appointment of a *guardian* to protect the interest of a minor child or an incompetent person, the probate court generally supervises every aspect of the payment of the decedent's surviving obligations and the distribution of the decedent's assets.
  
- **Non-Probate Assets:** The decedent's interest in certain assets that designate a beneficiary (*e.g.*, *inter vivos trusts*, life insurance policy proceeds, IRAs, joint checking accounts with rights of survivorship) pass to the designated beneficiary without going through the probate process.

# INTESTACY

- When a person dies without leaving a valid will, he is said to have died *intestate*. In such cases, the deceased's property passes according to law, rather than according to his wishes.
  
- Generally speaking, an intestate's property passes first to any **surviving spouse and children**.
  
- **Stepchildren** are not entitled to inherit unless the intestate legally **adopted** them prior to her death.
  
- **Illegitimate children** generally inherit only from their mother.
  
- When the intestate has no surviving spouse, her property will typically pass to her surviving children, if any, and grandchildren, if any, either
  - (1) *per stirpes* (meaning that each grandchild by non-surviving child X will divide child X's share, and each grandchild by non-surviving child Y will divide child Y's share – even if child Y produced twice as many grandchildren as child X), or
  
  - (2) *per capita* (meaning that each child – or, if there are no surviving children, each grandchild – will take an equal share).

# EXPRESS TRUSTS

- **Trust:** An arrangement by which title to property owned by one person (the *grantor* or *settlor*) is held by another person (the *trustee*) for the benefit of a third person (the *beneficiary*). In addition to a designated beneficiary and a designated trustee, a valid trust requires:
  - (1) funds or other property **sufficiently identified** to enable title to pass to the trustee, and
  - (2) **actual delivery** by the grantor to the trustee with the **intent** that title pass to the trustee.
  
- **Living or *Inter Vivos* Trust:** An express trust created by the grantor and effective **during the grantor's lifetime**.
  - The grantor of a **revocable** living trust **retains control** over the trust property, and is **free to amend, alter, or revoke** the trust, during his lifetime.
  - The grantor of an **irrevocable** living trust **cedes control** of the trust property to the trustee and relinquishes the right to amend, alter, or revoke it.
  
- **Testamentary Trust:** An express trust created by will and, therefore, not effective until the grantor's death.

## SPECIAL AND IMPLIED TRUSTS

- **Charitable Trust:** A trust in which the property held by a trustee must be used for a charitable purpose, such as the advancement of health, education, or religion.
- **Spendthrift Trust:** A trust created to protect a beneficiary from spending all the money to which he or she is entitled, by parceling out the trust proceeds over time.
- **Totten Trust:** A trust created by the deposit of a person's own money in his or her own name as trustee for another.
  - A Totten trust is revocable at will until the grantor dies or completes the gift by some unequivocal act or declaration.
- **Resulting Trust:** An *implied trust* arising from the conduct of the parties, where one party holds legal title to another's property, but only for the other's benefit.
- **Constructive Trust:** An *equitable trust* imposed by a court in the interest of fairness and justice when someone wrongfully holds legal title to property.



# TRUSTEE'S DUTIES

- **Standard of Care:** A trustee must administer the trust with (1) **honesty**, (2) **good faith**, and (3) **prudence**. A trustee's performance of her duties is judged against the degree of care a **reasonably prudent person** would exercise in her personal affairs.
  
- **Duty of Loyalty:** A trustee must act in the **exclusive** interest of the trust beneficiaries.
  
- A trustee's specific duties include:
  - keeping clear and accurate **accounts** of the trust's administration;
  
  - furnishing a complete and correct **accounting** to the beneficiaries;
  
  - keeping the trust's assets **separate** from hers;
  
  - **distributing**, at reasonable intervals, the net income of trust assets to any income beneficiaries;
  
  - **diversifying** the trust's assets; and
  
  - **disposing** of unreasonably risky assets.

## TRUSTEE'S AUTHORITY

- The trust document may prescribe the trustee's authority and direct the trustee in the performance of her duties. A trust containing such terms "trumps" state law, unless the terms of the trust are contrary to law or public policy.
- In the absence of specific terms in the trust, a trustee generally may and must:
  - confine investments of the trust's principal to **conservative debt securities**, such as government bonds and first mortgages on realty;
  - balance the needs of *income beneficiaries* for a reliable stream of income against the importance of maintaining the principal of the trust for the sake of the *principal beneficiaries* (the *remaindermen*); and
  - **allocate** the **expenses** of maintaining trust assets between income and principal beneficiaries in accordance with applicable state law.

# ESTATE PLANNING

- **Durable Power of Attorney:** A written – and, where necessary, notarized – document authorizing a party to act on behalf of the person granting the power of attorney when the grantor becomes incapacitated.
  
- **Health-Care Power of Attorney:** A written – and, where necessary, notarized – document designating a party to have the power to choose what type of and how much medical treatment the grantor will receive when the grantor is incapable of making those decisions for himself.
  
- **Living Will:** A form of health care power of attorney that informs those reading it whether the maker wants certain lifesaving or life-sustaining procedures to be undertaken in situations where the treatment will not likely improve the maker’s quality of life.
  - While state laws regarding living wills often require that precise language be used and other formalities be observed, once a valid living will is created, those same laws generally require physicians to abide by the terms of the living will, notwithstanding their best medical judgment.