



# BUSINESS LAW

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TEXT AND CASES

*Fourteenth Edition*

CLARKSON • MILLER • CROSS

## CHAPTER 51: WILLS AND TRUSTS

# § 1: WILLS [1 OF 34]

- ◆ Wills and trusts are two basic devices used in **estate planning**.
- ◆ Estate planning may also involve transferring property as well as executing powers of attorney and living wills. →

# WILLS [2 OF 34]

- ◆ A will is the final declaration of how a person desires to have his or her property disposed of after death.
- ◆ A will can also appoint a guardian for minor children or incapacitated adults as well as appoint a personal representative to settle the affairs of the deceased. →

# WILLS [3 OF 34]

## ◆ Terminology of Wills:

- A person who makes a will is a **testator** since a will is referred to as a *testamentary disposition* of property.
- A person who dies with a valid will is said to have died **testate**.
- A *probate court* is responsible for administering any legal problems surrounding a will. →

# WILLS [4 OF 34]

## ◆ Terminology of Wills:

- An **executor** is a personal representative named in a will.
- An **administrator** is a personal representative appointed by the court when the person dies without a will. →

## ◆ Terminology of Wills:

- A person who dies without a valid will is said to have died **intestate**. In this situation, state **intestacy laws** prescribe the distribution of the property among heirs or next of kin.
- If no heirs or kin can be found, the property will **escheat** (title will be transferred to the state). →

## ◆ Terminology of Wills:

- A gift of real estate by will is generally called a **devise**, and the recipient of the real property is a **devisee**.
- A gift of personal property by will is a **bequest**, or **legacy**. The recipient of the personal property is a **legatee**.

## ◆ Laws Governing Wills:

- To *probate* a will means to establish its validity and carry the administration of the estate through a process supervised by a probate court. →



## ◆ Laws Governing Wills:

- The Uniform Probate Code (UPC):
  - Codifies general principles and procedures for the resolution of conflicts in settling estates.
  - Relaxes some of the requirements for a valid will contained in earlier state laws.

# WILLS [9 OF 34]

- ◆ **Types of Gifts:** Gifts by will can be *specific, general, or residuary*.
  - If a decedent's assets are not sufficient to cover all the gifts identified in the will, an abatement is necessary. →

## ◆ Types of Gifts:

### ■ Specific and General Devises or Bequests:

- A *specific* devise or bequest (legacy) describes specific property that can be distinguished from all the rest of the testator's property.
- A *general* devise or bequest (legacy) does not single out any item of property to be transferred by will.

## ◆ Types of Gifts:

- **Residuary Clause:** Provides that any assets remaining after the estate's debts have been paid and specific gifts have been made are to be distributed in a specific way. →

## ◆ Types of Gifts:

- **Abatement:** A situation in which the assets of an estate are insufficient to pay all general bequests in full. An abatement means that the legatees receive reduced benefits.
- **Lapsed Legacies:** Occurs when legatee dies before the death of the testator or before the legacy is payable. →

# WILLS [13 OF 34]

- ◆ **Requirements for a Valid Will:** Although the required formalities vary among jurisdictions, most states require proof of (1) the testator's capacity, (2) testamentary intent, (3) a written document, (4) the testator's signature, and (5) the signatures of persons who witnessed the testator's signing of the will.

# WILLS [14 OF 34]

## ◆ Requirements for a Valid Will:

- **Testamentary Capacity and Intent:** The testator must have testamentary capacity (be of legal age and sound mind *at the time the will is made*). The minimum legal age for executing a will in most states and under the UPC is eighteen years (UPC 2–501). →
  - **SEE CASE IN POINT 51.3 IN RE SUCCESSION OF SIRGO, (2014).**

# WILLS [15 OF 34]

- ◆ **Requirements for a Valid Will:**
  - **Testamentary Capacity and Intent:** A valid will must represent the maker's intention to transfer and distribute her or his property. Generally, a testator must: →



# WILLS [16 OF 34]

## ◆ Requirements for a Valid Will:

### ■ Testamentary Capacity and Intent:

- Know the nature of the act (intend to make a will).
- Comprehend and remember the people to whom the testator would naturally leave his or her estate. →

# WILLS [17 OF 34]

- ◆ **Requirements for a Valid Will:**
  - **Testamentary Capacity and Intent:**
    - Know the nature and extent of her or his property.
    - Understand the distribution of assets called for by the will. →

# WILLS [18 OF 34]

- ◆ **Requirements for a Valid Will:**
  - **Testamentary Capacity and Intent:**
    - Know the nature and extent of her or his property.
    - Understand the distribution of assets called for by the will. →

# WILLS [19 OF 34]

## ◆ Requirements for a Valid Will:

### ■ Testamentary Capacity and Intent:

- **Undue Influence:** If the decedent's plan of distribution was the result of fraud or undue influence, the will is declared invalid. A court may infer undue influence when the named beneficiary influenced the making of the will. →
- **SEE CASE IN POINT 51.4 *IN RE ESTATE OF JOHNSON (2011)*.**

# WILLS [20 OF 34]

- ◆ **Requirements for a Valid Will:**
  - **Testamentary Capacity and Intent:**
    - **Disinheritance:** There is no requirement that testators give their estates to the natural heirs. A testator may decide to disinherit—or leave nothing to—an individual for various reasons.
      - **SEE CASE IN POINT 51.5 *IN RE ESTATE OF MELTON* (2012).**

# WILLS [21 OF 34]

## ◆ Requirements for a Valid Will:

- **Writing Requirements:** A will can be handwritten (*holographic* will), but a nuncupative (oral) will is possible.
- **Signature Requirements:** A fundamental requirement is that the testator's signature must appear on the will, generally at the end.

## ◆ Requirements for a Valid Will:

- **Witness Requirements:** A will usually must be attested (sworn to) by two—and sometimes three—witnesses.
- Purpose of the witnesses is to verify that the testator actually executed (signed) the will and had the requisite intent and capacity at the time.

## ◆ Revocation of Wills:

- A executed will is revocable by the maker any time before death.
- **Revocation by a Physical Act:** A testator can revoke a will by intentionally destroying it or by intentionally having someone else destroy it in the testator's presence and at the testator's direction. →



## ◆ Revocation of Wills:

- **Revocation by a Physical Act:** In no circumstances can a provision be crossed out and an additional substitute provision written in its place. →
  - **SEE CASE ANALYSIS 51.1 *PETERSON V. HARRELL* (2010).**

## ◆ Revocation of Wills:

- **Revocation by a Subsequent Writing:** A will may be wholly or partially revoked by a **codicil**, a written instrument separate from the will that amends provisions in the will.

## ◆ Revocation of Wills:

### ■ Revocation by Operation of Law:

- **Marriage and Divorce:** In most states, when a testator marries after executing a will and the will does not provide for the new spouse, the new spouse can still receive a share of the testator's estate.
- Divorce does not necessarily revoke the entire will. →

## ◆ Revocation of Wills:

### ■ Revocation by Operation of Law:

- **Children:** Even if a child is born after a will has been executed, most state laws allow a child of the deceased to receive some portion of a parent's estate—even if no provision is made in the parent's will. →

# WILLS [28 OF 34]

## ◆ Revocation of Wills:

### ■ Revocation by Operation of Law:

- **Children:** This is true *unless it is clear from the will's terms that the testator intended to disinherit the child.*

- ◆ **Rights under a Will:** The law imposes certain limitations on the way a person can dispose of property in a will.
  - Beneficiaries can renounce (disclaim) their shares.
  - Spouses in some states can renounce what is given them in the will and elect to take the forced share.

# WILLS [30 OF 34]

- ◆ **Probate Procedures:** Probate is the court process by which a will is proved valid or invalid.
  - *Informal Probate Proceedings:* Family settlement agreements and small estates.
  - Once a will is admitted to probate, the family members can decide among themselves on how to distribute the decedent's assets. →

## ◆ Probate Procedures:

- **Formal Probate:** Formal probate proceedings normally are undertaken for larger estates, guardianship appointment, and trusts for minors. The probate court supervises every aspect of the process. →



## ◆ Probate Procedures:

- **Formal Probate:** Formal probate proceedings may take several months or years to complete, depending on the size/complexity of the estate and whether the will is contested.

## ◆ Property Transfers outside the Probate Process:

- People can often avoid the cost of probate by employing will substitutes such as *living trusts*, life insurance policies, and individual retirement accounts (IRAs) with named beneficiaries. →

## ◆ **Property Transfers outside the Probate Process:**

- Other ways to transfer property outside the probate process are to make gifts to one's children or others while one is still living or to own property in a joint tenancy.

## § 2: INTESTACY LAWS (1 OF 8)

- ◆ Statutes of descent and distribution which attempt to carry out the likely intent and wishes of the decedent who died without a will. →

# INTESTACY LAWS [2 OF 8]

## ◆ Surviving Spouse and Children:

- Surviving spouse usually receives half of the estate if there is a surviving child.
- Surviving spouse usually receives only half of the estate, one-third if two or more children, half if one surviving child, or entire estate if no children or grandchildren.

# INTESTACY LAWS [3 OF 8]

- ◆ **When There Is No Surviving Spouse or Child:** If no surviving spouse or child, the order of inheritance is:
  - lineal descendants and then
  - collateral heirs (if no lineal descendants).

# INTESTACY LAWS [4 OF 8]

## ◆ Stepchildren, Adopted Children, and Illegitimate Children:

- Stepchildren are not considered children of the deceased.
- Adopted children (and children who were in the process of being adopted at the time of the prospective parent's death) are considered children of deceased. →

# INTESTACY LAWS [5 OF 8]

- ◆ **Stepchildren, Adopted Children, and Illegitimate Children:**
  - Statutes vary regarding the inheritance rights of illegitimate children.
  - While they have inheritance rights in most states, their rights are not necessarily identical to those of legitimate children.



# INTESTACY LAWS [6 OF 8]

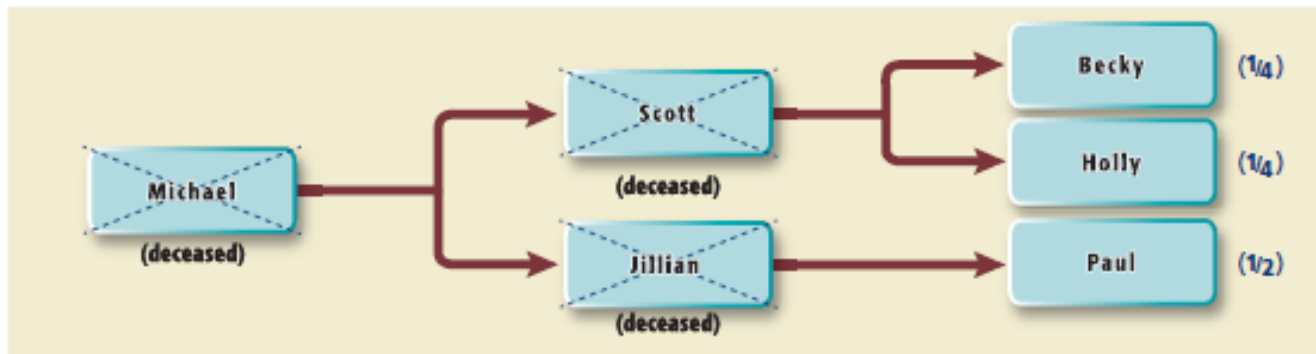
## ◆ Distribution to Grandchildren:

- *Per stirpes* distribution: Heirs take the share their deceased parent would have taken had that parent lived.
- *Per capita* distribution: Each person in a class or group takes an equal share of the estate. →

# INTESTACY LAWS [7 OF 8]

## EXHIBIT 51-2 *Per Stirpes* Distribution

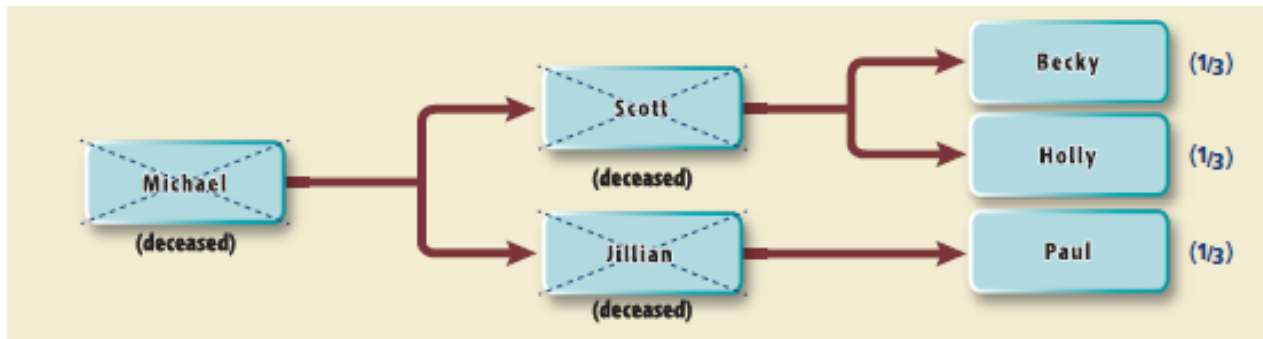
Under this method of distribution, an heir takes the share that his or her deceased parent would have been entitled to inherit had the parent lived. This may mean that a class of distributees—the grandchildren in this example—will not inherit in equal portions. Note that Becky and Holly receive only one-fourth of Michael's estate while Paul inherits one-half.



# INTESTACY LAWS [8 OF 8]

## EXHIBIT 51-3 *Per Capita* Distribution

Under this method of distribution, all heirs in a certain class—in this example, the grandchildren—inheritor equally. Note that Becky and Holly in this situation each inherit one-third, as does Paul.



## § 3: TRUSTS [1 OF 17]

- ◆ A **trust** is any arrangement whereby property (real or personal) is held by one party for the benefit of another.
- ◆ Trusts can be created to become effective during a person's lifetime or after a person's death.
- ◆ Trusts may be established for any purpose that is not illegal or against public policy, and they may be express or implied. →

# TRUSTS [2 OF 17]

- ◆ The essential elements of a trust are a designated beneficiary, designated trustee, funds sufficiently identified to enable title to pass to the trustee, actual delivery to the trustee with the intention of passing title. →

# TRUSTS [3 OF 17]

- ◆ **Express Trusts:** An express trust is created or declared in explicit terms, usually in writing.
  - **Living Trusts:** A living trust (or *inter vivos* trust) is created by a grantor during her or his lifetime. →

# TRUSTS [4 OF 17]

## ◆ Express Trusts:

### ■ Living Trusts:

- **Revocable Living Trusts:** The grantor retains control over the trust property during her or his lifetime. The grantor deeds the property to the trustee but retains the power to amend, alter, or revoke the trust during her or his lifetime. →

# TRUSTS [5 OF 17]

## ◆ Express Trusts:

### ■ Living Trusts:

- **Irrevocable Living Trusts:** 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. →



# TRUSTS [6 OF 17]

## ◆ Express Trusts:

- **Testamentary Trusts:** A **testamentary trust** is created by will and comes into existence on the grantor's death. A testamentary trust has a trustee who maintains legal title to the trust property and the trustee's actions are subject to judicial approval. →

# TRUSTS [7 OF 17]

## ◆ Express Trusts:

- **Charitable Trusts:** A **charitable trust** is an express trust designed for the benefit of a segment of the public or the public in general. The identities of the beneficiaries are uncertain and the trust can be established to last indefinitely. →

# TRUSTS [8 OF 17]

## ◆ Express Trusts:

- **Spendthrift Trusts:** A **spendthrift trust** is created to provide for the maintenance of a beneficiary by preventing him or her from being careless with the bestowed funds. The beneficiary is not permitted to transfer or assign his or her rights to the trust's principal or future payments from the trust. →

# TRUSTS [9 OF 17]

## ◆ Express Trusts:

- **Totten Trusts:** A **Totten trust** is created when a grantor deposits funds into an account in her or his own name with instructions that in the event of the grantor's death, whatever is in that account should go to a specific beneficiary.

# TRUSTS [10 OF 17]

- ◆ **Implied Trusts:** A trust may be imposed (implied) by law, even in the absence of an express trust.
- **Constructive Trusts:** A constructive trust is imposed by a court in the interests of fairness and justice. →

# TRUSTS [11 OF 17]

## ◆ Implied Trusts:

### ■ Constructive Trusts:

- The owner of the property is declared to be a trustee for the parties who are actually entitled to the benefits that flow from the trust in equity.
- Courts often impose constructive trusts when a confidential or fiduciary relationship has been breached. →

# TRUSTS [12 OF 17]

## ◆ Implied Trusts:

- **Resulting Trusts:** A **resulting trust** arises from the conduct of the parties. The trust results (or is created) when circumstances raise an inference that the party holding legal title to the property does so for the benefit of another. The trust will result unless the inference is refuted.

# TRUSTS [13 OF 17]

- ◆ **The Trustee:** The trustee is the person holding the trust property.
  - **Trustee's Duties:** Honesty, good faith, and prudence in administering the trust and high degree of loyalty to beneficiaries.
    - A trustee's specific duties include the following: →



# TRUSTS [14 OF 17]

## ◆ The Trustee:

### ■ Trustee's Duties:

- Maintain clear and accurate accounts of the trust's administration.
- Furnish complete and correct information to the beneficiary.
- Keep trust assets separate from her or his own assets. →

# TRUSTS [15 OF 17]

## ◆ The Trustee:

### ■ Trustee's Duties:

- Pay to an income beneficiary the net income of the trust assets at reasonable intervals.
- Limit the risk of loss from investments by reasonable diversification and dispose of assets that do not represent prudent investments.

# TRUSTS [16 OF 17]

## ◆ The Trustee:

- **Trustee's Powers:** State law governs in the absence of specific language in will or instrument.
- **Allocations between Principal and Income:** A grantor will often provide one beneficiary with a life estate and another beneficiary with the remainder interest in the trust.

# TRUSTS [17 OF 17]

## ◆ Trust Termination:

- The trust ends when expressly specified in trust. If the trust does not provide specification of termination, trust does not end at death of beneficiary or trustee.
- If its purpose has been fulfilled before the termination date, a court may terminate it. When purpose becomes illegal or impossible, the trust will terminate.

# § 4: OTHER ESTATE- PLANNING ISSUES (1 OF 5)

- ◆ **Power of Attorney:** A power of attorney gives a person (an agent) authority to act on another's behalf. The powers usually are limited to a specific context. →

# OTHER ESTATE-PLANNING ISSUES (2 OF 5)

## ◆ Power of Attorney:

- **Durable Power of Attorney:** Authorizes an individual to act on behalf of another when he or she becomes incapacitated. The person to whom the power is given can then manage the incapacitated person's affairs, including health care.

# OTHER ESTATE-PLANNING ISSUES (3 OF 5)

## ◆ Power of Attorney:

- **Durable Power of Attorney:** If a person becomes incapacitated without having executed a durable power of attorney, a court may appoint a conservator to handle that person's financial affairs. →

# OTHER ESTATE-PLANNING ISSUES [4 OF 5]

## ◆ Power of Attorney:

- **Health-Care Power of Attorney:** A health-care power of attorney designates a person who will have the power to choose what type of and how much medical treatment a person who is unable to make such decisions will receive. →



# OTHER ESTATE-PLANNING ISSUES (5 OF 5)

- ◆ **Living Will:** Advanced health directive that allows a person to control what medical treatment they will receive after a serious accident or illness.
  - Typically, state statutes require physicians to abide by the terms of living wills, and living wills are often included with a patient's medical records.