WILLS (1 of 16)

- Wills and trusts are two basic devices used in the process of **estate planning**—determining in advance how one's property and obligations should be transferred on death. Estate planning may also involve transferring property through life insurance and joint-tenancy arrangements, as well as executing powers of attorney and living wills.

- A **will** is the final declaration of how a person desires to have her or his property disposed of after death. It is a formal instrument that must follow exactly the requirements of state law to be effective.

- A will can serve other purposes besides the distribution of property. It can appoint a guardian for minor children or incapacitated adults. It can also appoint a personal representative to settle the affairs of the deceased.

- **Terminology of Wills:**

  - A person who makes a will is known as a **testator** (from the Latin *testari,* "to make a will"). A will is referred to as a *testamentary disposition* of property, and one who dies after having made a valid will is said to have died **testate**.

  - The court responsible for administering any legal problems surrounding a will is called a *probate court*. When a person dies, a personal representative administers the estate and settles all the decedent's (deceased person's) affairs.

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- An **executor** is a personal representative named in a will, whereas an **administrator** is a personal representative appointed by the court for a decedent who dies without a will. The court will also appoint a representative if the will does not name an executor or if the named person lacks the capacity to serve as an executor.

- A person who dies without having created a valid will is said to have died **intestate**. In this situation, state **intestacy laws** (sometimes referred to as *laws of descent*) 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).

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

- **Laws Governing Wills:** To **probate** a will means to establish its validity and to carry the administration of the estate through a court process. Probate laws vary from state to state.

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- The National Conference of Commissioners on Uniform State Laws issued the Uniform Probate Code (UPC) to promote more uniformity among the states. The UPC codifies general principles and procedures for the resolution of conflicts in settling estates. The UPC also relaxes some of the requirements for a valid will contained in earlier state laws.

- Almost half of the states have enacted some part of the UPC and incorporated it into their own probate codes. Nonetheless, succession and inheritance laws still vary widely among the states, and one should always check the particular laws of the state involved.

- **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.

  - **Specific and General Devises or Bequests:** A *specific* devise or bequest (legacy) describes particular property (such as "Eastwood Estate" or "my gold pocket watch") that can be distinguished from all the rest of the testator's property.

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- A *general* devise or bequest (legacy) does not single out any item of property to be transferred by will. For instance, "I devise all my lands" is a general devise. A general bequest may specify the property's value in monetary terms (such as "two diamonds worth $10,000") or simply state a dollar amount (such as "$30,000 to my nephew, Carleton").

- **Residuary Clause:** Sometimes, a will 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 through a *residuary clause.* Residuary clauses are often used when the exact amount to be distributed cannot be determined until all other gifts and payouts have been made. If the testator has not indicated what party or parties should receive the residuary of the estate, the residuary passes according to state laws of intestacy.

- **Abatement:** If the assets of an estate are insufficient to pay in full all general bequests provided for in the will, an *abatement* takes place. An abatement means that the legatees receive reduced benefits.

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- If bequests are more complicated, abatement may be more complex. The testator's intent—as expressed in the will—controls.

- **Lapsed Legacies:** If a legatee dies before the death of the testator or before the legacy is payable, a *lapsed legacy* results. At common law, the legacy failed. Today, the legacy may not lapse if the legatee is in a certain blood relationship to the testator (such as a child, grandchild, brother, or sister) and has left a child or another surviving descendant.

- **Requirements for a Valid Will:** A will must comply with statutory formalities designed to ensure that the testator understood his or her actions at the time the will was made. These formalities are intended to help prevent fraud. Unless they are followed, the will is declared void, and the decedent's property is distributed according to the laws of intestacy of that state.

  - Although the required formalities vary among jurisdictions, most states have certain basic requirements for executing a will. 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.

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- **Testamentary Capacity and Intent:** For a will to be valid, the testator must have testamentary capacity—that is, the testator must 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). Thus, the will of a twenty-one-year-old decedent written when the person was sixteen is invalid if, under state law, the legal age for executing a will is eighteen.

  - The concept of "being of sound mind" refers to the testator's ability to formulate and to comprehend a personal plan for the disposition of property. Persons who have been declared incompetent in a legal proceeding do not meet the sound mind requirement.

  - Related to the requirement of capacity is the concept of intent. A valid will is one that represents the maker's intention to transfer and distribute her or his property. Generally, a testator must:

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(1) Know the nature of the act (intend to make a will).

(2) Comprehend and remember the people to whom the testator would naturally leave his or her estate (such as family members and friends).

(3) Know the nature and extent of her or his property.

(4) Understand the distribution of assets called for by the will.

- **Undue Influence:** When it can be shown that the decedent's plan of distribution was the result of fraud or undue influence, the will is declared invalid. A court may sometimes infer undue influence when the named beneficiary was able to influence the making of the will. For instance, a presumption of undue influence might arise if the testator ignored blood relatives and named as a beneficiary a nonrelative who was in constant close contact with the testator.

- **Disinheritance:** Although a testator must be able to remember the persons who would naturally be heirs to the estate, 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.

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- Most states have laws that attempt to prevent accidental disinheritance. There are also laws that protect minor children from the loss of the family residence. Therefore, the testator's intent to disinherit needs to be clear.

- **Writing Requirements:** Generally, a will must be in writing. The writing itself can be informal as long as it substantially complies with the statutory requirements. In some states, a will can be handwritten in crayon or ink.

  - It can be written on a sheet or scrap of paper, on a paper bag, or on a piece of cloth. A will that is completely in the handwriting of the testator is called a **holographic will** (sometimes referred to as an *olographic will*).

  - A **nuncupative will** is an oral will made before witnesses. Oral wills are not permitted in most states. Where authorized by statute, such wills are generally valid only if made during the last illness of the testator and are therefore sometimes referred to as *deathbed wills*. Normally, only personal property can be transferred by a nuncupative will. Statutes may also permit members of the military to make nuncupative wills when on active duty.

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- **Signature Requirements:** A fundamental requirement is that the testator's signature must appear on the will, generally at the end. Each jurisdiction dictates by statute and court decision what constitutes a signature. Initials, an X or other mark, and words such as "Mom" have all been upheld as valid when it was shown that the testators *intended* them to be signatures.

- **Witness Requirements:** A will usually must be *attested* (sworn to) by two, and sometimes three, witnesses. The number of witnesses, their qualifications, and the manner in which the witnessing must be done are generally set out in a statute. A witness may be required to be *disinterested* (not a beneficiary under the will). However, the UPC allows even interested witnesses to attest to a will (UPC 2–505). There are no age requirements for witnesses, but they must be mentally competent.

    - The 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. A witness need not read the contents of the will. Usually, the testator and all witnesses sign in the sight or the presence of one another. The UPC does not require all parties to sign in one another's presence and deems it sufficient if the testator acknowledges her or his signature to the witnesses (UPC 2–502).

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- **Revocation of Wills:** The testator can revoke a will at any time during her or his life either by a physical act (such as tearing up the will) or by a subsequent writing. Wills can also be revoked by operation of law. Revocation can be partial or complete, and it must follow certain strict formalities.

  - **Revocation by a Physical Act:** A testator can revoke a will by *intentionally* burning, tearing, canceling, obliterating, or otherwise destroying it. A testator can also revoke a will by intentionally having someone else destroy it in the testator's presence and at the testator's direction.

    - When a state statute prescribes the specific methods for revoking a will by a physical act, only those methods can be used to revoke the will. In some states, a testator can partially revoke a will by the physical act of crossing out some provisions in the will. The portions that are crossed out are dropped, and the remaining portions are valid.

    - In no circumstances can a provision be crossed out and an additional or substitute provision written in its place. Such altered provisions require that the will be reexecuted (signed again) and reattested (rewitnessed).

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- **Revocation by a Subsequent Writing:** A will may also be wholly or partially revoked by a **codicil**, a written instrument separate from the will that amends or revokes provisions in the will. A codicil 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 it must refer expressly to the will. In effect, it updates a will because the will is "incorporated by reference" into the codicil.

  - A new will (second will) can be executed that may or may not revoke the first or a prior will, depending on the language used. To revoke a prior will, the second will must use language specifically revoking other wills such as, "This will hereby revokes all prior wills." If the second will is otherwise valid and properly executed, it will revoke all prior wills. If the express *declaration of revocation* is missing, then both wills are read together. If there are any discrepancies between the wills, the second will controls.

- **Revocation by Operation of Law:** Revocation by operation of law occurs when marriage, divorce, annulment, or the birth of a child takes place after a will has been executed.

WILLS (12 of 16)

- **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. On the testator's death, the surviving spouse can receive the amount he or she would have taken had the testator died intestate. The rest of the estate passes under the will (UPC 2–301, 2–508).

  - If the new spouse is otherwise provided for in the will (or by transfer of property outside the will), he or she will not be given an intestate amount. If the parties had a valid *prenuptial agreement*, its provisions dictate what the surviving spouse receives.

  - Divorce does not necessarily revoke the entire will. Rather, a divorce or an annulment occurring after a will has been executed revokes those dispositions of property made under the will to the former spouse (UPC 2–508).

WILLS (13 of 16)

- **Children:** If a child is born after a will has been executed, that child may be entitled to a portion of the estate. 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. This is true *unless it is clear from the will's terms that the testator intended to disinherit the child*. Under the UPC, the rule is the same.

- **Rights under a Will:** The law imposes certain limitations on the way a person can dispose of property in a will. For instance, a married person who makes a will generally cannot avoid leaving a certain portion of the estate to the surviving spouse unless there is a valid prenuptial agreement. In most states, this is called an *elective share* or a *forced share,* and it is often one-third of the estate or an amount equal to a spouse's share under intestacy laws.

  - Beneficiaries under a will have rights as well. A beneficiary can renounce (disclaim) his or her share of the property given under a will. A surviving spouse can also renounce the amount given under a will and elect to take the forced share when the forced share is larger than the amount of the gift.

WILLS (14 of 16)

- State statutes provide the methods by which a surviving spouse accomplishes renunciation. The purpose of these statutes is to allow the spouse to obtain whichever distribution would be more advantageous. The UPC gives the surviving spouse an elective right to take a percentage of the total estate determined by the length of time that the spouse and the decedent were married to each other (UPC 2–201).

- **Probate Procedures:** Probate is the court process by which a will is proved valid or invalid. Since probate laws vary from state to state, the procedures used to probate a will typically depend on the size of the decedent's estate.

  - **Informal Probate:** For smaller estates, most state statutes provide for the distribution of assets without formal probate proceedings. Faster and less expensive methods are then used. Property can be transferred by *affidavit* (a written statement taken in the presence of a person who has authority to affirm it).

    - Problems or questions can be handled during an administrative hearing. Some states allow title to cars, savings and checking accounts, and certain other property to be transferred simply by filling out forms. Most states also provide for *family settlement agreements,* which are private agreements among the beneficiaries.

WILLS (15 of 16)

- Once a will is admitted to probate, the family members can agree among themselves on how to distribute the decedent's assets. Although a family settlement agreement speeds the settlement process, a court order is still needed to protect the estate from future creditors and to clear title to the assets involved.

- **Formal Probate:** For larger estates, formal probate proceedings normally are undertaken, and the probate court supervises every aspect of the process. Additionally, in some situations—such as when a guardian for minor children must be appointed—more formal probate procedures cannot be avoided.

  - Formal probate proceedings may take several months or several years to complete, depending on the size and complexity of the estate and whether the will is contested. When the will is contested, or someone objects to the actions of the personal representative, the duration of probate is extended. Thus, a sizable portion of the decedent's assets (as much as 10 percent) may go to pay the fees charged by attorneys and personal representatives, as well as court costs.

- **Property Transfers outside the Probate Process:** Often, people can avoid the cost of probate by employing various **will substitutes**. Examples include *living trusts,* life insurance policies, and individual retirement accounts (IRAs) with named beneficiaries.

WILLS (16 of 16)

- One way to transfer property outside the probate process is to make gifts to one's children or others while one is still living. Another way is to own property in a joint tenancy. In a joint tenancy, when one joint tenant dies, the other joint tenant or tenants automatically inherit the deceased tenant's share of the property. This is true even if the deceased tenant has provided otherwise in her or his will. Not all alternatives to formal probate administration are suitable to every estate.

INTESTACY LAWS (1 of 4)

- Each state regulates by statute how property will be distributed when a person dies intestate (without a valid will). Intestacy laws attempt to carry out the likely intent and wishes of the decedent. These laws assume that deceased persons would have intended that their natural heirs (spouses, children, grandchildren, or other family members) inherit their property.

- Intestacy statutes set out rules and priorities under which these heirs inherit the property. If no heirs exist, the state will assume ownership of the property. The rules of descent vary widely from state to state. It is thus important to refer to the exact language of the applicable state statutes when addressing any problem of intestacy distribution.

- **Surviving Spouse and Children:** Usually, state statutes provide that first the debts of the decedent must be satisfied out of the estate. Then the remaining assets pass to the surviving spouse and to the children.

    - A surviving spouse usually receives only a share of the estate—typically, one-half if there is also a surviving child and one-third if there are two or more children. Only if no children or grandchildren survive the decedent will a surviving spouse receive the entire estate.

    - Under most state intestacy laws and under the UPC, in-laws do not share in an estate. Thus, if a child dies before his or her parents, the child's spouse will not receive an inheritance on the parents' death.

INTESTACY LAWS (2 of 4)

- **When There Is No Surviving Spouse or Child:** When there is no surviving spouse or child, the order of inheritance is generally grandchildren, then parents of the decedent. These relatives usually are called *lineal* relatives. If there are no lineal heirs, then *collateral heirs*—brothers and sisters, nieces and nephews, and aunts and uncles of the decedent—are the next groups that share.
  - If there are no survivors in any of these groups, most statutes provide for the property to be distributed among the next of kin of the collateral heirs.

- **Stepchildren, Adopted Children, and Illegitimate Children:** Under intestacy laws, stepchildren are not considered kin. Legally adopted children are recognized as lawful heirs of their adoptive parents. (This is also true of children who are in the process of being adopted at the time of a prospective parent's death.)
  - Statutes vary from state to state regarding the inheritance rights of illegitimate children (children born out of wedlock). Although illegitimate children have inheritance rights in most states, their rights are not necessarily identical to those of legitimate children.

INTESTACY LAWS (3 of 4)

- In some states, an illegitimate child has the right to inherit only from the mother and her relatives, unless the father's paternity has been established by a legal proceeding.

- In many states, a child born of any union that has the characteristics of a formal marriage relationship (such as unmarried parents who cohabit) is considered to be legitimate.

- Under the revised UPC, a child is generally considered the child of the natural (biological) parents, regardless of their marital status. The child cannot inherit from a natural parent unless that natural parent has openly treated the child as his (or hers) and has not refused to support the child (UPC 2–114).

- **Grandchildren:** Usually, a decedent's will provides for how the estate will be distributed to descendants of deceased children (grandchildren whose parents have died).

  - If a will does not include such a provision—or if a person dies intestate—the question arises as to what share the grandchildren of the decedent will receive. Each state uses one of two methods of distributing the assets of intestate decedents—*per stirpes* or *per capita.*

INTESTACY LAWS (4 of 4)

- ***Per Stirpes* Distribution:** Under the ***per stirpes*** method, within a class or group of distributees (such as grandchildren), the children of a descendant take the share that their deceased parent *would have been* entitled to inherit. Thus, a grandchild with no siblings inherits all his or her parent's share, while grandchildren with siblings divide their parent's share.

- ***Per Capita* Distribution:** An estate may also be distributed on a ***per capita*** basis, which means that each person in a class or group takes an equal share of the estate.

TRUSTS (1 of 10)

- A **trust** is any arrangement by which property is transferred from one person to a trustee to be administered for the transferor's or another party's benefit. It can also be defined as a right of property (real or personal) held by one party for the benefit of another.

- A trust 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.

  - The essential elements of a trust are as follows:

    (1) A designated beneficiary (except in charitable trusts, discussed shortly).

    (2) A designated trustee.

    (3) A fund sufficiently identified to enable title to pass to the trustee.

    (4) Actual delivery by the *settlor* or *grantor* (the person creating the trust) to the trustee with the intention of passing title.

TRUSTS (2 of 10)

- **Express Trusts:** An express trust is created or declared in explicit terms, usually in writing. There are numerous types of express trusts, each with its own special characteristics.

  - **Living Trusts:** A **living trust**—or *inter vivos* trust (*inter vivos* is Latin for "between or among the living")—is a trust created by a grantor during her or his lifetime. Living trusts have become a popular estate-planning option because at the grantor's death, assets held in a living trust can pass to the heirs without going through probate.

    - Note that living trusts do not necessarily shelter assets from estate taxes. The grantor may also have to pay income taxes on trust earnings, depending on whether the trust is revocable or irrevocable.

    - **Revocable Living Trusts:** In a revocable living trust (the most common type), 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 (3 of 10)

- The grantor may also serve as a trustee or co-trustee and can arrange to receive income earned by the trust assets during her or his lifetime. Because the grantor is in control of the funds, she or he is required to pay income taxes on the trust earnings.

- Unless the trust is revoked, the principal of the trust is transferred to the trust beneficiary on the grantor's death.

- **Irrevocable Living Trusts:** In an irrevocable living trust, the grantor permanently gives up control over the property to the trustee. 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.

  - The trustee must preserve the trust property and make it productive. If required by the terms of the trust agreement, the trustee must pay income to the beneficiaries in accordance with the terms of the trust. Because the grantor has effectively given over the property for the benefit of the beneficiaries, he or she is no longer responsible for paying income taxes on the trust earnings.

TRUSTS (4 of 10)

- **Testamentary Trusts:** A **testamentary trust** is created by will and comes into existence on the grantor's death. Although a testamentary trust has a trustee who maintains legal title to the trust property, the trustee's actions are subject to judicial approval. The trustee can be named in the will or appointed by the court (if not named in the will). The legal responsibilities of the trustee are the same as in a living trust.

  - If a court finds that the will setting up a testamentary trust is invalid, then the trust will also be invalid. The property that was to be in the trust will then pass according to intestacy laws, not according to the terms of the trust. If the court finds that a condition of the trust is invalid because it is illegal or against public policy, the court will invalidate that condition only and enforce the trust without it.

- **Charitable Trusts:** A **charitable trust** is an express trust designed for the benefit of a segment of the public or the public in general. It differs from other types of trusts in that the identities of the beneficiaries are uncertain and it can be established to last indefinitely. Usually, to be deemed a charitable trust, a trust must be created for charitable, educational, religious, or scientific purposes.

TRUSTS (5 of 10)

- **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. Unlike the beneficiaries of other trusts, the beneficiary in a spendthrift trust is not permitted to transfer or assign his or her rights to the trust's principal or future payments from the trust.
  - Essentially, the beneficiary can draw only a certain portion of the total amount to which he or she is entitled at any one time. Most states allow spendthrift trust provisions that prohibit creditors from attaching such trusts—with a few exceptions—such as for payment of a beneficiary's domestic-support obligations.

- **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. This type of trust is revocable at will until the depositor dies or completes the gift in her or his lifetime (by delivering the funds to the intended beneficiary, for instance). The beneficiary has no access to the funds until the depositor's death, when the beneficiary obtains property rights to the balance on hand.

- **Implied Trusts:** Sometimes, a trust will be imposed (implied) by law, even in the absence of an express trust. Implied trusts include constructive trusts and resulting trusts.

TRUSTS (6 of 10)

- **Constructive Trusts:** A **constructive trust** is imposed by a court in the interests of fairness and justice. In a constructive trust, 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 someone who is in a confidential or fiduciary relationship with another person (such as a guardian to a ward) has breached a duty to that person. A court may also impose a constructive trust when someone wrongfully holds legal title to property. This may occur when the property was obtained through fraud or in breach of a legal duty, for instance.

- **Resulting Trusts:** A **resulting trust** arises from the conduct of the parties. Here, 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.

- **The Trustee:** The trustee is the person holding the trust property. Anyone legally capable of holding title to, and dealing in, property can be a trustee. If a trust fails to name a trustee, or if a named trustee cannot or will not serve, the trust does not fail. An appropriate court can appoint a trustee.

TRUSTS (7 of 10)

- **Trustee's Duties:** A trustee must act with honesty, good faith, and prudence in administering the trust and must exercise a high degree of loyalty toward the trust beneficiary. The general standard of care is the degree of care a prudent person would exercise in his or her own personal affairs. The duty of loyalty requires that the trustee act in the exclusive interest of the beneficiary. A trustee's specific duties include the following:

  (1) Maintain clear and accurate accounts of the trust's administration.

  (2) Furnish complete and correct information to the beneficiary.

  (3) Keep trust assets separate from her or his own assets.

  (4) Pay to an income beneficiary the net income of the trust assets at reasonable intervals.

  (5) Limit the risk of loss from investments by reasonable diversification and dispose of assets that do not represent prudent investments. (Prudent investment choices might include federal, state, or municipal bonds and some corporate bonds and stocks.)

TRUSTS (8 of 10)

- **Trustee's Powers:** When a grantor creates a trust, he or she may set forth the trustee's powers and performance. State law governs in the absence of specific terms in the trust, and the states often restrict the trustee's investment of trust funds.
  - Typically, statutes confine trustees to investments in conservative debt securities such as government, utility, and railroad bonds and certain real estate loans.
  - A grantor frequently gives 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.
  - A trustee is responsible for carrying out the purposes of the trust. If the trustee fails to comply with the terms of the trust or the controlling statute, he or she is personally liable for any loss.
- **Allocations between Principal and Income:** Often, a grantor will provide one beneficiary with a life estate and another beneficiary with the remainder interest in the trust.

TRUSTS (9 of 10)

- For instance, a farmer may create a testamentary trust providing that the farm's income be paid to the surviving spouse and that, on the surviving spouse's death, the farm be given to their children.

- In this situation, the surviving spouse has a *life estate* in the farm's income, and the children have a *remainder interest* in the farm (the principal).

- When a trust is set up in this manner, questions may arise as to how the receipts and expenses for the farm's management and the trust's administration should be allocated between income and principal. When a trust instrument does not provide instructions, a trustee must refer to applicable state law.

- The general rule is that ordinary receipts and expenses are chargeable to the income beneficiary, whereas extraordinary receipts and expenses are allocated to the principal beneficiaries. The receipt of rent from trust realty would be ordinary, as would the expense of paying the property's taxes. The cost of long-term improvements and proceeds from the property's sale would be extraordinary.

TRUSTS (10 of 10)

- **Trust Termination:** The terms of a trust should expressly state the event on which the grantor wishes it to terminate—for instance, the beneficiary's or the trustee's death. If the trust instrument does not provide for termination on the beneficiary's death, the beneficiary's death will not end the trust. Similarly, without an express provision, a trust will not terminate on the trustee's death.

  - Typically, a trust instrument specifies a termination date. For instance, a trust created to educate the grantor's child may provide that the trust ends when the beneficiary reaches the age of twenty-five. If the trust's purpose is fulfilled before that date, a court may order the trust's termination. If no date is specified, a trust will terminate when its purpose has been fulfilled. Of course, if a trust's purpose becomes impossible or illegal, the trust will terminate.

OTHER ESTATE-PLANNING ISSUES (1 of 3)

- Estate planning involves making difficult decisions about the future, such as who will inherit the family home and other assets and who will take care of minor children.

- Estate planning also involves preparing in advance for other contingencies such as illness and incapacity. Powers of attorney and living wills are frequently executed in conjunction with a will or trust to help resolve these matters.

- **Power of Attorney:** A power of attorney is often used in business situations to give a person (an agent) authority to act on another's behalf. The powers usually are limited to a specific context (such as negotiating a deal with a buyer or entering into various contracts necessary to achieve a particular objective). Powers of attorney are also commonly used in estate planning.

  - **Durable Power of Attorney:** One method of providing for future disability is to use a durable power of attorney.

    - A **durable power of attorney** authorizes an individual to act on behalf of another when he or she becomes incapacitated. It can be drafted to take effect immediately or only after a physician certifies that the person is incapacitated.

    - The person to whom the power is given can then write checks, collect insurance proceeds, and otherwise manage the incapacitated person's affairs, including health care.

OTHER ESTATE-PLANNING ISSUES (2 of 3)

- Adult children may seek a durable power of attorney from their aging parents, particularly if the parents are becoming mentally incapacitated by some condition. A husband and wife may give each other a power of attorney to make decisions if one of them is hospitalized and unable to express her or his wishes.

- A person who is undergoing an operation may sign a durable power of attorney to a loved one who can take over his or her affairs in the event of incapacity.

- If you become incapacitated without having executed a durable power of attorney, a court may need to appoint a conservator to handle your financial affairs. Although a spouse may have the ability to write checks on joint accounts, her or his power is often significantly limited. In most situations, it is better to have named a person you wish to handle your affairs in case you cannot.

- **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.

  - The importance of appointing a person to make health-care decisions has grown as medical technology enables physicians and hospitals to keep people alive for ever-increasing periods of time.

OTHER ESTATE-PLANNING ISSUES (3 of 3)

- **Living Will:** A living will is not a will in the usual sense because it does not appoint an estate representative, dispose of property, or establish a trust. Rather, a **living will** is an advance health directive that allows a person to control what medical treatment may be used after a serious accident or illness.

  - Through a living will, a person can indicate whether he or she wants certain lifesaving procedures to be undertaken in situations in which the treatment will not result in a reasonable quality of life.

  - Most states have enacted statutes permitting living wills, and it is important that the requirements of state law be followed exactly in creating such wills. 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.