

ASPEN COLLEGE SERIES

■ Gerry W. Beyer ■ John K. Hanft

WILLS, TRUSTS, AND ESTATES FOR LEGAL ASSISTANTS

FIFTH EDITION



Wolters Kluwer

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ESTATES FOR
LEGAL ASSISTANTS**

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PREFACE



Wills, Trusts, and Estates for Legal Assistants covers intestate succession, wills, trusts, estate administration, nonprobate assets, wealth transfer taxation, disability and death planning (including elder law concerns), and malpractice and professional responsibility. We designed this book as the text for courses that expose legal assistant students to estate planning, decedents' estates, elder law, and trusts. The discussion, along with the examples, explanations, and practice tips, covers both the theoretical and practical applications of the legal concepts.

We have attempted to present the material in a lively, lucid, and conversational style to grab and hold your interest. Sections begin typically with a discussion of the applicable concept (including policies and basic "rules"), followed by a series of examples (hypothetical questions) accompanied by explanations (answers). Key terms are defined in the margin and the glossary. We are confident that this "learning-by-doing" approach will enable you to master the concepts and enjoy yourself in the process. The exercises in this book also let you evaluate how well you can apply what you have learned.

Working through problems is one of the best ways to understand intestacy, wills, and trusts concepts. For example, it is one thing to learn about per stirpes, per capita, per capita by representation, and per capita at each generation in the abstract, but the differences really strike home only when you see the tremendous impact they can make on an heir's inheritance depending on which view local law adopts. Likewise, full appreciation of concepts such as exoneration, ademption, abatement, and lapse cannot be achieved until you see their effect on the distribution of a testator's estate.

Practical suggestions, labeled *Practice Tips*, are liberally sprinkled throughout the book. You will also find sample will and trust provisions. These features should help you to appreciate the real-world application of your legal assistant course. Properly preparing and managing files and documents is critical in the field of estate planning, and the practice tips are designed to guide you through that process.

Wills, trusts, and estates is the only subject that will apply to all of your firm's clients eventually. As Shakespeare wrote in *King Henry IV*, "death . . . is certain to all, all shall die." You can appreciate the value of wills and trusts that avert legal problems and help alleviate some of the emotional stress and financial costs surrounding this undeniable and inescapable fact.

Organization and Scope of This Book

Part One focuses on intestate succession. Issues relating to the distribution schemes for property are covered first, followed by how various types of persons, e.g., adopted children and children born out of wedlock, fit into these schemes. Part One ends with a discussion of assorted intestate succession issues such as advancements and disclaimers.

Part Two is the book's comprehensive coverage of wills. The first chapter, which details the requirements of a valid will, is followed by chapters exploring changes in the testator's circumstances, will revocation, will interpretation and construction, and will contests.

Part Three presents an overview of estate administration. As the details of administration are heavily dependent on local law, this section is relatively brief and highlights the typical procedure and the issues that frequently arise.

Part Four deals with nonprobate transfers such as inter vivos gifts, joint tenancies, multiple-party accounts, life insurance, and annuities. These assets must be removed from the decedent's holdings at death before applying the terms of the applicable intestacy statute or will to determine the property's new owner.

Part Five examines trusts beginning with reasons people use trusts, trust creation issues, trust administration matters, and trust enforcement methods. Subsequent chapters discuss the related topics of resulting and constructive trusts.

Part Six covers other estate planning concerns. This part includes discussions of (1) the basics of federal gift and estate taxation to familiarize you with fundamental concepts such as the annual exclusion, applicable exclusion amount, marital deduction, and by-pass planning; (2) methods available to plan for a person's property management and health care decisions upon disability as well as the death event itself, including durable powers of attorney, living wills, anatomical gift documents, and instruments to control the final disposition of the body; and (3) a discussion of negligent will and trust drafting and a review of the most common ethical concerns for attorney and legal assistants that arise in a wills, estates, and trusts practice.

Fifth Edition Enhancements

Although the fifth edition retains the basic structure and content of the previous editions, we have made a number of changes to reflect recent developments and trends as well as to enhance the usefulness of this book. Some of the significant changes in the fifth edition include additional or updated coverage of the following:

- Recent changes governing federal gift, estate, and generation-skipping transfer taxes
- Rights and liabilities of same-sex spouses
- Lack of capacity marriages
- Notarized wills

- Physician orders for life-sustaining treatment
- Modifying the terms of an irrevocable trust by “decanting”

How to Use This Book

Wills, Trusts, and Estates for Legal Assistants is designed to be used in three ways:

Read in the order presented. You may study the material in the order presented. This order traces the traditional organization of wills, trusts, and estates courses. An alternative approach, gaining in popularity, is to cover the nonprobate assets discussed in Part Four first, because these assets are removed from a decedent’s estate before the rules of intestate succession or the terms of the decedent’s will are applied.

Read in the order covered by your professor. You may read the material in the order covered by your professor in class. Using the Table of Contents as a guide, you should have no difficulty correlating your professor’s syllabus with the relevant chapters of this book.

Use as a reference tool. You may use the book to assist your study on an issue-by-issue basis. Consult the comprehensive Index to quickly locate the material relevant to your inquiry.

Recommendations and Advice

Probate law is very dependent on state law. A will valid in one state may be totally ineffectual in another. You may want to obtain a copy of your state’s probate code and see how the examples discussed in this book would be resolved under your state’s law. In addition, this book makes frequent reference to the Uniform Probate Code and the Uniform Trust Code.

Although the basic law of wills, trusts, and estates is relatively static, significant developments frequently occur. You may access updates to this book at <http://www.ProfessorBeyer.com>. In addition, if you detect any problems with this book or have suggestions for future editions, we would greatly appreciate your sharing them with us. You may e-mail the authors at gwb@ProfessorBeyer.com.

Good luck in your course and in your career as a legal assistant.

GERRY W. BEYER
JOHN K. HANFT

May 2015

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**WILLS, TRUSTS, AND
ESTATES FOR
LEGAL ASSISTANTS**

CHAPTER 1



INTRODUCTION AND OVERVIEW

Chapter Objectives

After completing this chapter, the student should be able to:

- Understand the basic terminology of intestate succession, wills, and trusts
- Explain what law governs estate and gift taxation and what law governs wills, trusts, and intestate succession
- Distinguish between common law and community property law marital property systems
- Identify community property states
- Define real property and personal property

§1.1 *Brief History of Property Transference When Owner Dies*

Possessions. Property ownership. Think about all the things you own: clothes, a car, jewelry, a television, a computer, a surround sound system, a home, and even this book. Barring bankruptcy, excessive spending habits, natural disasters, thievery, or large expenses such as those associated with a long-term illness, you will continue to accumulate possessions and will own more property as you grow older. When the inevitable comes and you are metabolically challenged, who will take over as the new owner of what you have left behind?

Early in human history, owning property was not a concern. Ancient peoples were nomadic and thus real property ownership was not an issue. There was just personal property such as clothes, weapons, farm implements, food preparation equipment, and perhaps some jewelry or other ornamentation. Where did this stuff go when the owner died? Before organized civilizations developed, the first person who picked up a deceased person's property after the person died would become the new owner. Just as they do

Chapter 1. Introduction and Overview

today, some people died at the hands of the person who wanted to become the owner of their property. As people banded together in groups for camaraderie and survival, they needed to develop rules for the transmission of property upon death. An uncontrolled scramble for a decedent's property would not be conducive to harmonious living.

In many of these early cultures, the family ownership model of personal property prevailed. When a person died, there was no need for a formal transfer of property because the property belonged to the family, rather than the deceased individual. Developing civilizations, however, brought about more individual property ownership, and thus more sophisticated methods for handling the transfer of ownership became necessary.

Most cultures eventually had to decide who among the survivors should own a decedent's property. Accordingly, either by custom or through more formal mechanisms, societies created a fixed set of rules to control property transference. These rules typically stressed the importance of family relationships, but the way in which family relationships were determined varied tremendously among different societies. For example, some determined relationships through the mother's side of the family while others stressed the father's side. Rules often varied depending on the age or sex of the surviving family members. The rules were typically rigid and did not allow for alteration due to the circumstances or the desires of the decedent. These rules evolved into what we now call *intestate succession* or *descent and distribution*.

Societies also developed methods for a person to issue instructions while alive that would specify the new owners of the person's property upon death. This power of testation has a basis in Egyptian society perhaps as long ago as 2900 B.C. Greek and Roman civilizations had extensive rules regarding wills. The development of wills at common law began in the Anglo-Saxon era, and was formally codified in 1540 in the English Statute of Wills, the precursor to the modern law of wills.

§1.2 *Basic Terminology Used in This Book*

Familiarity with some basic terminology will give us a common basis of communication. This section contains lists of the fundamental terms used in this book for intestate succession, wills, and trusts, along with some general terms. As you proceed through the book, you will learn scores of additional terms as well as nuances to the definitions provided here. This section gives you a foundation on which to base the rest of our discussion. If you are interested in the meaning of a term not defined in this section, need additional information, or have difficulty finding a term because the terms in these subsections are in pedagogical rather than alphabetical order, look for the term in the glossary of this book, or check the index for the appropriate section references.

§1.2.1 **Intestate Succession Terms**

INTESTATE SUCCESSION; INTESTACY; DESCENT AND DISTRIBUTION. Passage of property when the decedent dies without a valid will.

DESCENT. Succession to real property. Compare *Distribution*.

DISTRIBUTION. Succession to personal property. Compare *Descent*.

INTESTATE. Dying without a will. The phrase *the intestate* refers to the person who dies without a will. Compare *Testator* as defined in §1.2.2.

HEIR. A person entitled to take under intestate succession laws. Remember, you have no heirs because you are alive. You may be an heir (that is, inherit from a person who dies intestate), but you cannot have heirs. The persons who would be your heirs if you were to die intestate are often called your *presumptive heirs* or your *heirs apparent*. At old common law, heirs referred to people who took land while the term *next of kin* referred to people who took personal property. Persons who take under a will are not referred to as heirs. Compare *Beneficiary* as defined in §1.2.2.

ANCESTOR. A person related to the decedent in an ascending lineal line, for example, parents and grandparents. Compare *Descendant* and *Collateral Relative*.

DESCENDANT. A person related to the decedent in a descending lineal line, for example, children and grandchildren. Compare *Ancestor* and *Collateral Relative*.

COLLATERAL RELATIVE. A person related to the decedent but not in a lineal line, for example, siblings, nieces and nephews, aunts and uncles, and cousins. Compare

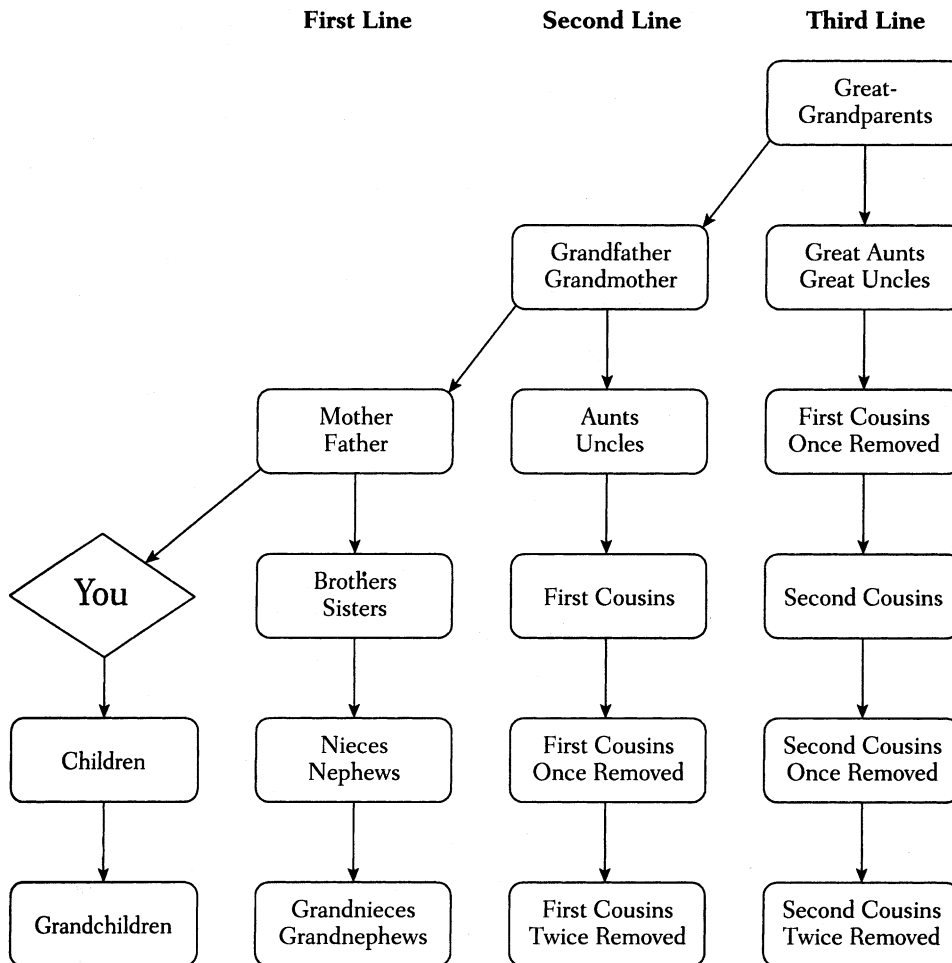


Exhibit 1.1 Relationship Chart

Chapter 1. Introduction and Overview

Ancestor and Descendant. If the collateral relative is a descendant of the decedent's parents, the relative is a *first line collateral* (for example, siblings, nieces, and nephews). If the collateral relative is a descendant of the decedent's grandparents, other than the decedent's parents and their descendants, the relative is a *second line collateral* (for example, aunts, uncles, and cousins). The chart below should help place family relationships into perspective. The names given to relatives in Exhibit 1.1 are based on the way you would refer to these individuals.

CONSANGUINEOUS RELATIONSHIP. A biological or blood relationship. Compare *Affinity Relationship*.

AFFINITY RELATIONSHIP. A relationship by marriage, that is, relatives people usually refer to as their "in-laws." Compare *Consanguineous Relationship*.

§ 1.2.2 Wills Terms

TESTATE SUCCESSION. The passage of property under the decedent's will.

WILL. A written document or oral declaration directing who will own the decedent's property upon the decedent's death. At common law, a *will* disposed of real property and a *testament* disposed of personal property. This distinction is rarely made today.

CODICIL. A type of will that merely amends an already existing will.

TESTATOR; TESTATRIX. A person who dies with a valid will. Traditionally, the term *testator* refers to a male and the term *testatrix* refers to a female. In modern usage, *testator* refers to any person who dies with a valid will, regardless of gender. Compare *the intestate* as defined in § 1.2.1.

DEVISE. A gift of real property in a will. The person who receives the devise is called the *devisee*.

BEQUEST. A gift of personal property in a will. See *Legacy*.

LEGACY. A gift of money in a will. The person who receives the legacy is called the *legatee*. A legacy is a type of bequest. See *Bequest*.

BENEFICIARY. Generic term for a person who receives property under a will, regardless of whether it is real or personal property. Compare *Heir* as defined in § 1.2.1. Also compare *Beneficiary* as defined in § 1.2.3.

§ 1.2.3 Trusts Terms

TRUST. A property conveyance whereby the owner divides title to the property into legal and equitable interests and imposes fiduciary duties on the holder of the legal title to deal with the property for the benefit of the holder of the equitable title.

SETTLOR. The person who creates a trust by making the property transfer that divides title and imposes duties. The settlor may also be called the *trustor*, the *grantor*, or the *donor*.

BENEFICIARY. The person who receives the equitable title to trust property and hence the right to benefit from that property according to the settlor's instructions. The beneficiary may also be called the *cestui que trust*, the *donee*, or the *grantee*.

TRUSTEE. The person who holds the legal title to trust property and has the fiduciary duty to manage that property according to the settlor's instructions and applicable trust law.

PRINCIPAL. The property held in trust form. The principal is also referred to as the trust *corpus*, *estate*, or *res*.

INCOME. The profits or other earnings made by property after it is conveyed in trust form (e.g., the interest on a certificate of deposit or the rent collected from real property).

§1.2.4 General Terms

ADMINISTRATION. The process of collecting and managing all a decedent's property so that the decedent's creditors are paid to the fullest extent allowed by law and the remaining property, if any, is turned over to the heirs or beneficiaries.

ADMINISTRATOR. The person in charge of administering the estate of an intestate decedent. Compare *Executor*. See *Personal Representative*.

EXECUTOR. The person in charge of administering the estate of a testate decedent. Compare *Administrator*. See *Personal Representative*.

PERSONAL REPRESENTATIVE. Generic term for the person in charge of administering the estate of a decedent. Compare *Administrator* and *Executor*.

PROBATE. In a broad sense, probate refers to the entire process of administering a decedent's estate. In a narrow sense, probate means to prove a document or oral declaration to be the decedent's valid will.

PROBATE ASSET. An asset of a decedent that passes either under intestate succession or through a will.

NONPROBATE ASSET. An asset of a decedent that passes in a manner other than under intestate succession or through a will. Typical nonprobate arrangements include joint tenancies with rights of survivorship and contracts that provide for the payment of benefits upon death to designated persons, such as life insurance, retirement plans, and accounts with financial institutions (e.g., joint accounts with survivorship rights and pay-on-death accounts). Part Four of this book provides a comprehensive coverage of nonprobate assets.

Practice tip

Use the appropriate terminology relating to wills, trusts, and estates with care, especially in written communications. Be aware of the assumptions and nuances that these terms carry.

§1.3 *Determination of Applicable Law*

§1.3.1 **Generally**

State law, rather than federal law, governs property succession at death, trusts, disability planning techniques, and other estate-planning matters. Federal law, not state law, governs federal estate and gift taxation. Except for Louisiana, whose law is based on the Roman civil law system, the estate-planning laws used in all other states originated with the English common law. Because of this shared ancestry, the general concepts and policies of probate and trust law are relatively similar among the states. The details, however, may differ widely.

Practice tip

Always be sure to check the law of the relevant state to resolve any probate-related issue. Relying on a “general” principle can lead to disastrous results.

Probate code

State statutes governing intestate succession, wills, estate administration, and related topics.

UPC

Uniform Probate Code.

UTC

Uniform Trust Code.

Each state has a set of statutes, usually called a **probate code**, which sets forth the state’s intestate distribution scheme, the requirements of a valid will, rules of construction and interpretation, and the methods of estate administration. Approximately 18 jurisdictions have adopted one of the many versions of the Uniform Probate Code (**UPC**) and many other states have enacted one or more UPC provisions on an ad hoc basis. A growing number of states have comprehensive trust statutes. The National Conference of Commissioners on Uniform State Laws approved the Uniform Trust Code (**UTC**) in 2000. Approximately 30 states and the District of Columbia have already enacted the UTC. Some additional areas of estate planning law are highly codified, while others are still based on common law concepts.

Practice tip

Become familiar with your state’s probate code. How is it organized? What are the divisions, parts, and chapters? What topics are covered? What terms are defined?

In addition to the Uniform Probate Code and the Uniform Trust Code, the following uniform laws relating to wills, trusts, and estates have been approved:

- Absence of Evidence of Death and Absentees’ Property Act
- Anatomical Gift Act
- Ancillary Administration of Estates Act
- Disclaimer of Property Interests Act
- Disclaimer of Transfers by Will, Intestacy or Apportionment Act
- Disclaimer of Transfers under Nontestamentary Instruments Act

- Disposition of Community Property Rights at Death Act
- Disposition of Unclaimed Property Act
- Durable Power of Attorney Act
- Estate Tax Apportionment Act
- Guardianship and Protective Proceedings Act
- Interstate Arbitration of Death Taxes Act
- Interstate Compromise of Death Taxes Act
- Intestacy, Wills, and Donative Transfers Act
- Multiple-Person Accounts Act
- Real Property Transfer on Death Act
- Simultaneous Death Act
- Status of Children of Assisted Conception Act
- Statutory Form Power of Attorney Act
- Statutory Rule Against Perpetuities
- Statutory Will Act
- Succession without Administration Act
- Survival and Death Act
- Testamentary Additions to Trusts Act
- Transfer on Death Security Registration Act
- Transfers to Minors Act
- Unclaimed Property Act
- Veterans' Guardianship Act

§1.3.2 Ownership and Marital Rights

If the decedent was married at the time of death, it is crucial to determine which property the decedent owned at death and which property actually belonged solely to the surviving spouse. Only the deceased spouse's property will pass through intestacy or be controlled by the deceased spouse's will.

It is necessary to determine what type of marital property system governs the parties and their property. Two types of marital property systems are used in the United States: **common law** and **community property**. Under a common law system, each spouse owns his or her entire income as well as any property brought into the marriage or acquired during the marriage by gift. Under a community property system, each spouse owns any property brought into the marriage or acquired during the marriage by gift, but only one-half of his or her income; the other half of the income vests in the other spouse as soon as it is earned. Although only nine states use the community property system (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington, along with Wisconsin due to its adoption of the Uniform Marital Property Act), these **community property states** account for over 25 percent of the population of the United States. One state, Alaska, permits married couples to hold their property as community property if they so desire.

If the spouses have lived in more than one type of marital property jurisdiction during the marriage, it is necessary to determine whether a spouse's earnings (and, consequently, any property purchased with those earnings) belong solely to the

Common law marital property system

Each spouse owns his or her entire income.

Community property marital property system

One-half of each spouse's income vests in the other spouse.

Community property states

- Arizona
- California
- Idaho
- Louisiana
- Nevada
- New Mexico
- Texas
- Washington
- Wisconsin

spouse who earned the money or whether the earnings are co-owned. The general principle, often called the *inception of title rule*, is that the ownership of the earnings is governed by the law of the spouse's domicile at the time the property was acquired. Marital title does not change as the couple moves from one type of marital property state to another.

Example 1-1. Marital Rights

Wife earned \$100,000 while domiciled in a common law marital property state and placed it into a certificate of deposit (CD-1). Husband and Wife then moved to a community property marital property state. Wife earned an additional \$100,000 and placed it into another certificate of deposit (CD-2). What property may Wife dispose of by her will?

Explanation

CD-1: The \$100,000 Wife earned and placed in CD-1 is her separate property under the law of the common law marital property state in which she earned the money. The key issue is what happens to the characterization of CD-1 when the couple moves into the community property state. Under the law of many community property states, CD-1 would remain Wife's separate property and she could leave it to whom-ever she desires. However, some community property states would characterize CD-1 as **quasi-community property**, that is, property that was acquired in a common law marital property state but that would have been community property if acquired in the community property state. Under the law of these community property states, Husband would become the owner of one-half of CD-1 upon Wife's death and Wife would only be able to control the disposition of the other half. Another important issue is the characterization of the interest that CD-1 has earned. Pre-move interest will either be Wife's separate property (allowing her to dispose of all the pre-move interest) or quasi-community property (allowing her to dispose of one-half of the pre-move interest). Depending on the particular law of the community property state, post-move interest may either remain Wife's separate property (allowing her to dispose of all of the post-move interest) or become community property (allowing her to dispose of one-half of the post-move interest).

CD-2: CD-2 is community property because Wife earned the money placed in CD-2 while domiciled in a community property state, which treats income as if earned equally by each spouse. Thus, Wife may dispose of one-half of CD-2, both principal and interest, by her will.

Quasi-community property

Property acquired in a non-community property state that would have been community property if acquired in a community property state.

Domicile

A person's permanent home, to which the person intends to return even if living temporarily elsewhere.

Real property

Land, trees, crops, etc., growing on land; structures erected on or attached to land.

Personal property

Movable or intangible things capable of ownership that are not real property.

§1.3.3 Real versus Personal Property

Issues regarding the transfer of **real property** at death are governed by the law of the state or nation in which the land is located. On the other hand, the law of the decedent's **domicile** at the time of death governs **personal property** matters. Thus, it may be necessary to apply the probate laws of several states or nations to determine the proper distribution of a decedent's estate.

§1.4 The “Big Picture”

We are born without property. During our lifetimes, we acquire property from a variety of sources. Some property we dispose of while alive and other property we retain until we die. Our goal is to learn the legal methods for property transfer focusing on **gratuitous transfers**, that is, transfers for which you receive nothing of monetary value in return, although you may receive appreciation, affection, and kind words.

Exhibit 1.2 provides the “big picture” and places property acquisition and disposition in perspective.

Gratuitous transfers

A transfer made without receiving money or other property in return.

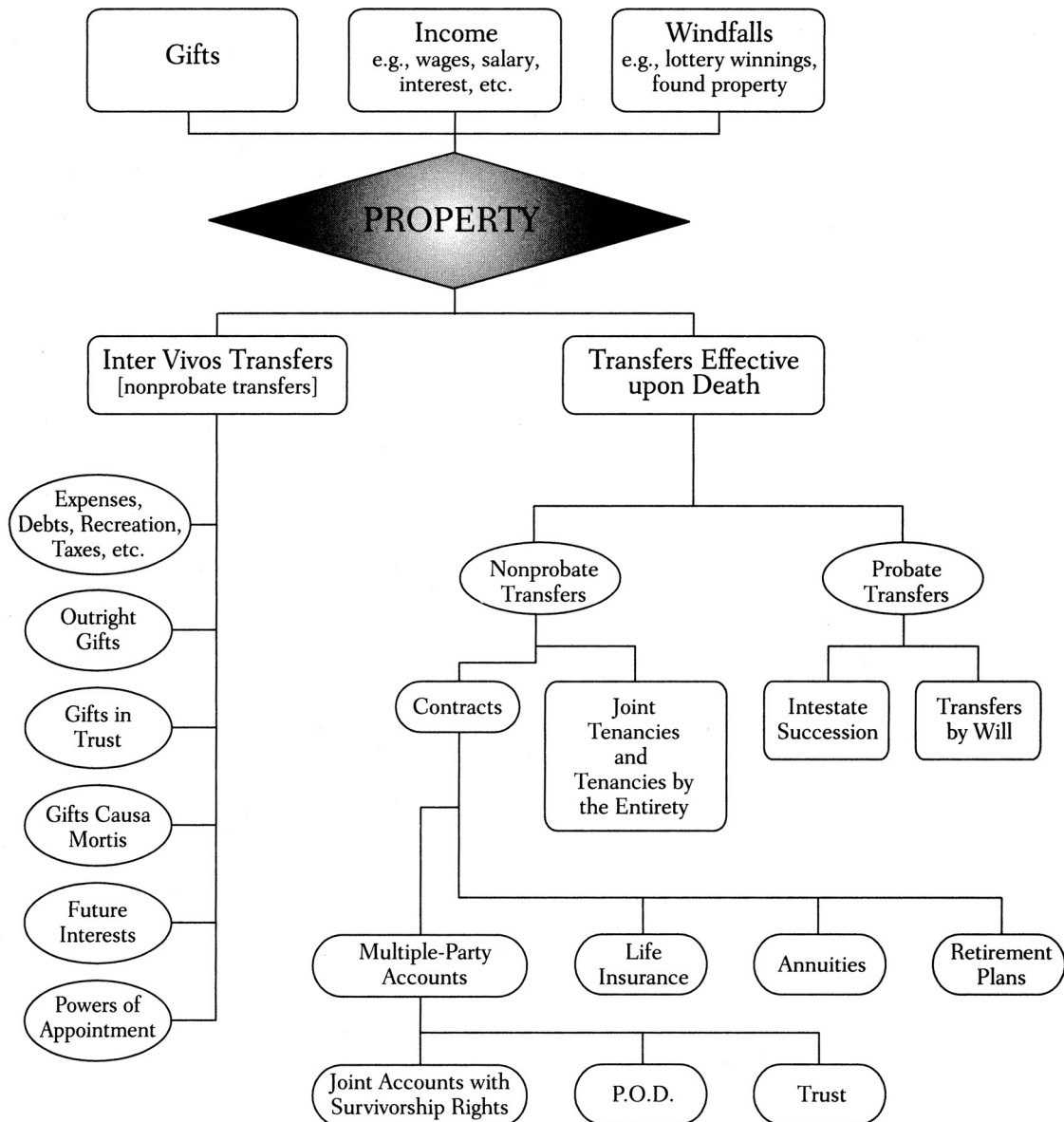


Exhibit 1.2 Property Acquisition and Disposal