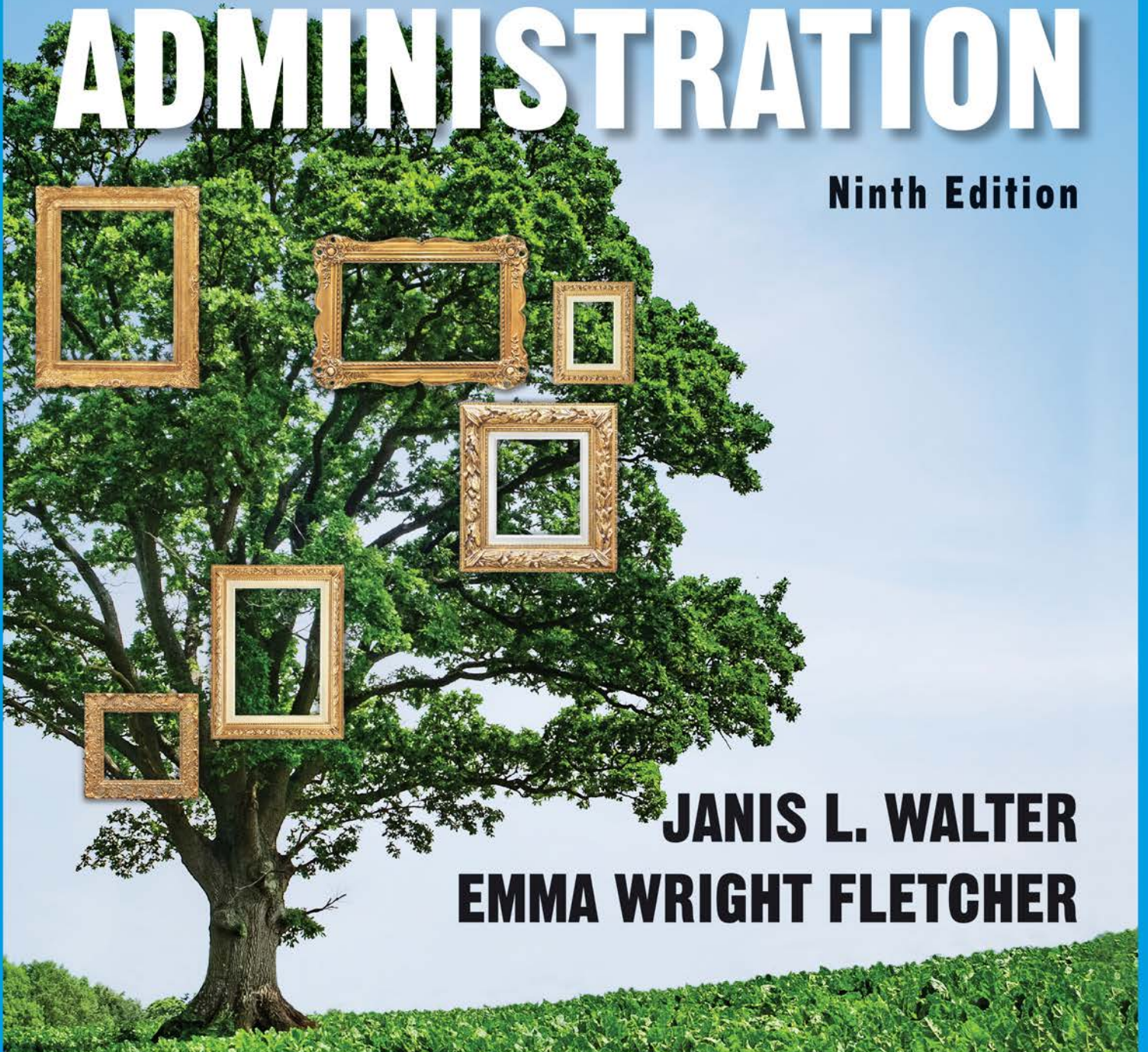


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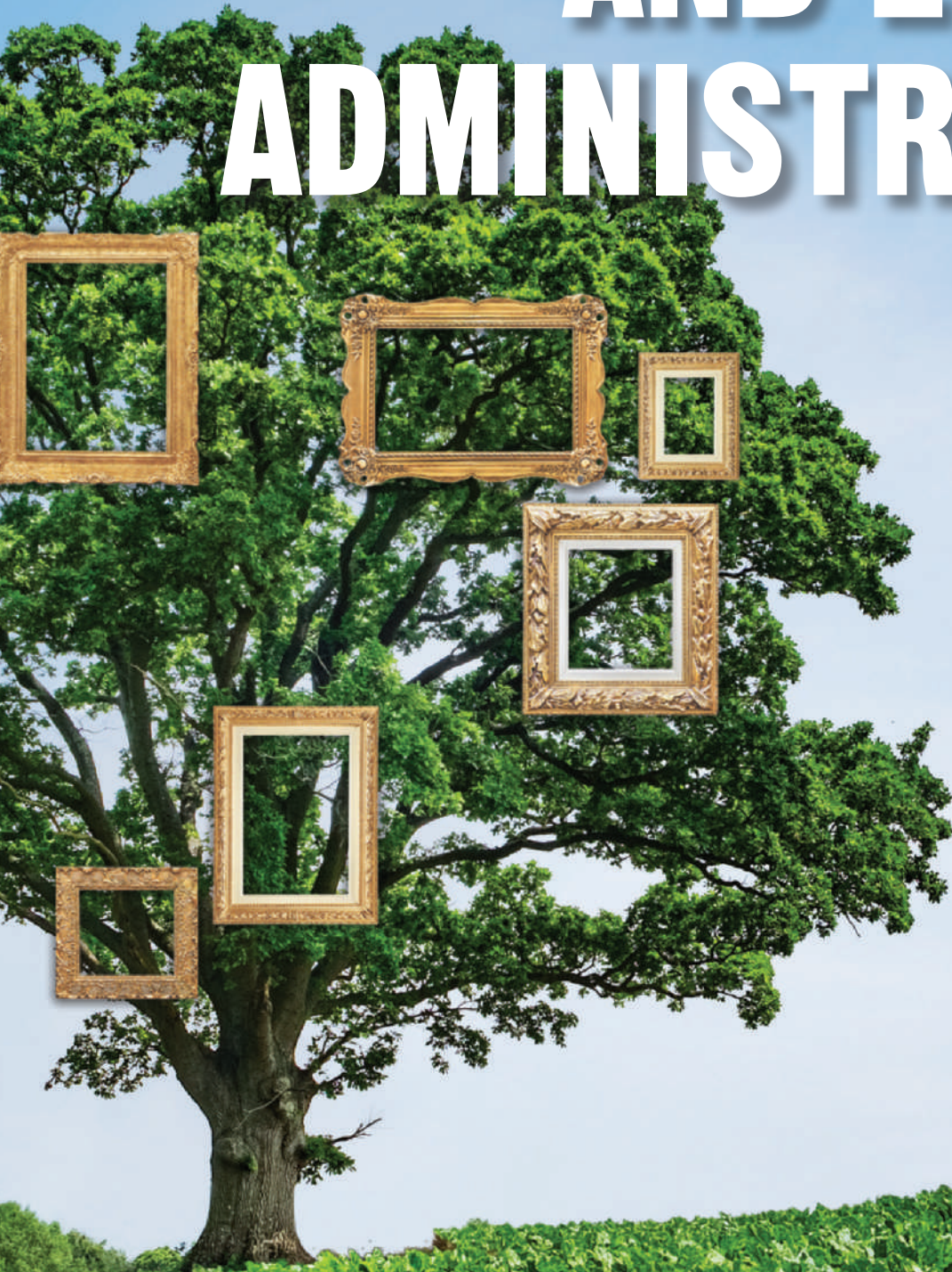
Ninth Edition



**JANIS L. WALTER
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WILLS, TRUSTS, AND ESTATE ADMINISTRATION

Ninth Edition





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WILLS, TRUSTS, AND ESTATE ADMINISTRATION

Ninth Edition

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Ninth Edition***

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*To my husband, children, and granddaughters: You are undeniably my greatest assets!
I am wealthy because of what you each bring to my life.*

–JW

*To my sweetest girls: You are the greatest gift I've ever known. May you always be
inspired to be strong women and make the world a better place.*

–EWF



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PREFACE



Over the past few decades, the performance of qualified and competent paralegals has raised their status as legal professionals. The economic benefits paralegals bring both to their employers (supervising attorneys) and to the firm's clients have proven their need and value. Therefore, it is no surprise that their vocation has grown rapidly. Although the current national market for paralegals remains strong, it will be competitive. Students who choose quality programs for their education and certification will have the best employment opportunities.

The goal of *Wills, Trusts, and Estate Administration* is to continue to provide a textbook that explains the basic, practical, everyday duties of a paralegal in the fields of law and prepares paralegals, such as yourself, to confidently undertake and successfully accomplish these tasks. After using the text and obtaining work experience, you will attain the level of competence that will enable you to perform your work with confidence and continue the success and uphold the standards that your profession demands.

The text is written primarily for paralegals, but others, such as trustees and personal representatives appointed to administer the estate of a deceased person, may find it useful. The text identifies the responsibilities and duties that a paralegal can perform under the supervision of an attorney when drafting a will or trust or assisting with the administration of a decedent's estate. The text provides a review of the terminology and general principles of law that are the bases for drafting wills and trusts, or planning and administering an estate, and identifies the participants and the duties they must perform in these legal areas. New material has been included to update the discussion of inheritance rights for same-sex couples, estate tax changes, disposition of digital assets, partition of heirs property, electronic wills, and special needs trusts. A chronological treatment of the step-by-step procedures required to complete the will and trust drafts and the administration of a decedent's estate is presented, including sample drafts and the executed forms needed to administer the estate. Current federal and state tax information and the appropriate tax forms are also discussed.

CHAPTER ORGANIZATION

To help students obtain confidence and proficiency, each chapter of the ninth edition contains the following features.

- **Objectives.** The objectives focus students on what they will learn upon completion of the chapter.

- **Scope of the Chapter.** The scope identifies and lists, in order, the topics to be discussed within the chapter.
- **Terminology.** Key terms are printed in boldface type and are defined in the margin at their first appearance. Key terms are also listed at the end of each chapter and defined in a comprehensive end-of-text glossary.
- **Examples, hypothetical situations, sample state statutes, legal forms, exhibits, checklists, drafted documents, and actual cases.** These are interspersed throughout the chapters to help students understand the concepts and procedures discussed.
- **Assignments.** Frequent assignments within the chapters require students to apply the chapter's legal concepts or to perform tasks required of a practicing paralegal.
- **Checklists.** Checklists that collect relevant client data and information are included in the text; "What You Do" lists and "You Must" notations in the Estate Administration chapter emphasize and clarify the actual procedures and specific tasks that the paralegal student must master to attain confidence and competency.
- **Ethical Issues.** Found throughout the text, these issues call attention to important ethical concerns that are relevant to the procedures discussed within the individual chapters.
- **Review Questions.** Review questions are included at the end of each chapter and have been revised to correspond to the content changes within the chapters.
- **Case Problems.** Actual cases and hypothetical problems are included at the end of the chapters to enable students to verify what they have learned and apply it to a specific problem or task discussed in the chapter.
- **Points of Interest.** Real-life contemporary cases or issues are included to enhance student understanding.
- **Practical Assignments.** Additional practical assignments have been added to the end of chapters to provide students with more hands-on skills that are required in the law office. Many incorporate the Internet as a research tool so that students can familiarize themselves with situations they will encounter as a practicing paralegal.

CHANGES IN THE NINTH EDITION

- *New legal topics.* The ninth edition includes a discussion of electronic wills, partition of heirs property, tax changes, and special needs trusts. It also includes updated information on the disposition of digital assets. This topic continues to be overlooked by many practitioners in estate planning and administration despite the prolific use of social media, email, and digital accounts. Sample updated forms addressing these issues have been included.
- *Reorganization of chapters.* Chapters have been reorganized to match the order in which a paralegal instructor is more likely to cover the materials. A student must understand the basic concepts of property before being able to determine what one would include in an estate. Once we have completed the discussion of estate administration and taxation of the estate, the focus switches to trusts and their classifications. The ninth edition concludes with estate planning and issues regarding long-term care.
- *Statutes.* State statutes that identify the variations in state laws and emphasize the need for paralegals to master the statutes of the state in which they live and practice have been added or updated.
- *State-by-state charts.* All charts have been updated where appropriate.
- *Legal forms.* Legal forms have been updated within the chapters, and essential newly executed estate administration forms, including selected tax forms, are included in Appendix A.
- *Surviving spouse.* The definition has been expanded and a discussion added to reflect changes in state laws as they apply to same-sex conjugal couples; new information includes a state chart.
- *Checklists.* The checklists used for collecting data and information for drafting wills, trusts, or an estate plan have been revised where necessary.
- *Tax laws.* The information in Chapter 11, including all pertinent charts, has been updated to reflect current tax regulations.
- *Uniform Probate Code.* The Uniform Probate Code is available at law libraries and online; state versions can also be accessed online.
- *Points of Interest.* Information regarding current issues and cases has been added to allow the student to reflect on real-life situations and how they might affect an estate practice.
- *Practical Assignments.* More practical assignments have been added to increase the marketability of the student.

SUPPLEMENTAL TEACHING AND LEARNING MATERIALS

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Additional instructor resources for this product are available online. Instructor assets include an Instructor's Manual, Educator's Guide, PowerPoint® slides, and a test bank powered by Cognero®. Sign up or sign in at www.cengage.com to search for and access this product and its online resources.

Instructor's Manual and Test Bank

The **Instructor's Manual and Test Bank** have been greatly expanded to incorporate changes in the text and to provide comprehensive teaching support. They include the following:

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The authors would like to thank product manager Abbie Schultheis, associate content manager Emily Olsen, and learning designer Mara Vuillaume for trusting in us to complete this ninth edition revision of *Wills, Trusts, and Estate Administration*. The process has been time-consuming and challenging, but their insight and guidance have been invaluable. Additional thanks go to the reviewers of the text for their suggestions and for ensuring that we stay current!

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CHAPTER 1

The Estate Plan and the Purpose and Need for a Will



CHAPTER OUTLINE

SCOPE OF THE CHAPTER

THE ESTATE PLAN

AN INTRODUCTION TO WILLS

Statutory Requirements for a Will
Basic Terminology Related to Wills

THE PURPOSE OF WILLS

Funeral and Burial Plans and the Letter of Instructions
Apportionment for Death Taxes
Property Distributions

Provisions for Family Members
Appointment of Fiduciaries: Guardians and Conservators
Creation of Testamentary Trusts
Selection of a Personal Representative

WILL SUBSTITUTES

BASIC REQUIREMENTS FOR A LEGAL WILL—A REVIEW

THE NEED FOR A WILL—A CONCLUSION

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:

- Explain the need for and purpose of an estate plan and the procedures and documents used to create a plan.
- Explain the reasons why many Americans die without a will.
- Identify the basic terminology of wills and trusts.
- Explain the function and purpose of wills.
- Identify and contrast the procedures and outcomes when property is passed by testacy versus intestacy.
- Recognize the terms used to identify the persons who make, manage, administer, or benefit from wills, trusts, and a deceased person's estate.
- Identify the functions of fiduciaries including guardians, conservators, trustees, and personal representatives.
- Identify examples of instances where a person may not need a will.
- Summarize the requirements for a legal will.

SCOPE OF THE CHAPTER

Estate law is a branch of law that concerns a person's estate—one's real and personal property. Through estate planning, one can make decisions and issue directives about their assets both during their lifetime and after. This chapter begins with a general discussion on the need for an estate plan and the legal documents, (e.g., wills and trusts) required for its creation. Basically, making an estate plan in advance of one's death allows one to identify who should receive their property, who will manage it during the process, and who should be guardian of their minor children, all while minimizing potential tax consequences. In the following chapter, there is a discussion of what constitutes property. After a brief explanation of the reasons people in this country die without wills, the terminology associated with the law of wills, trusts, and estate administration is introduced as you begin the process of mastering the terms and legal concepts essential to the practice of law in these areas. A discussion of the purpose and use of wills and the necessity of having a will, also called a **testament**, concludes this chapter.

testament

Another name for a will.

THE ESTATE PLAN

Estate planning is the determination and use of a method to accumulate, manage, and dispose of real and personal property by the owner of the property during life and after death and to minimize the income, gift, inheritance, and estate taxes due. The purpose of estate planning is to identify, preserve, and increase the assets owned and provide for distribution of these assets, with the least possible tax expense, to family members and institutions the owner wishes to benefit. If estate planning is properly performed, the intent and desires of the owner will be accomplished, and the beneficiary-recipients (primarily family) will receive the maximum benefit and enjoyment of the property.

Unfortunately, most people are so involved in their daily activities that they give little thought to the consequences of their deaths. As people grow older, they do give thought to their mortality. Many realize the importance of making an estate plan, which can include purchasing life insurance to protect their dependents. However, people often die prematurely and fail to provide through a valid will or an appropriate trust for those for whom they care. The consequences of these acts of procrastination can be financially devastating.

The following chapters in this book explain in detail how to categorize property and ways you can assist in the creation and use of trusts and wills to resolve and avoid unfortunate consequences. It is also important that you are prepared to assist those who have the responsibility for estate planning and administration, i.e., your supervising attorney and the personal representative of the decedent's estate.

In addition to the attorney, numerous other individuals are qualified to give estate planning advice. They include trust officers from banks and trust companies, accountants, investment advisers, financial planners, and life insurance agents. Acting as a team, many of these advisers will take an active role in the development of an appropriate estate plan for each client. The attorney you assist will give advice on legal matters, the accountant will handle tax concerns, the financial planner will advise on investments, and the life insurance agent may play a key role in the formation of an insurance policy to ensure financial security for the client's family. While you assist these estate planners, your tasks will be to gather information, maintain records, and communicate by phone or letters to update and keep the client and planners informed of the plan's progress. *Such tasks require you to neither divulge confidential information nor submit or propose unauthorized legal advice even in response to a specific request.*

ETHICAL ISSUE

POINT OF INTEREST

Estate Planning Advice Is Everywhere!

Advertisements for estate planning tips and asset protection tools flourish on the Internet. Television commercials are common for mutual funds and related products. More and more insurance agents and stockbrokers are presenting investment/estate planning seminars. Seniors are not the only target market. Presentations are made in the workplace, to civic groups, at business expos—really, just about everywhere. In our wealthy country, there are many companies that wish to influence how Americans spend and invest their money. Some nonlawyers may have given legal advice to clients; therefore, clients may need to be reminded that legal advice comes from attorneys. Other investment and retirement planning advice needs to come from the appropriate professionals.

Everyone who lives a normal life span accumulates assets they want to transfer after death. Real estate, cash, art, jewelry, securities, business ownership, boats, planes, antiques, profit-sharing plans, pension plans, life insurance, IRAs, 401(k) plans, Social Security, and

other employment and government benefit plans are a few examples of the wide variety of assets frequently acquired during one's life. The total value of the property items that form an individual's estate can be considerable and may be much larger than initially anticipated; e.g., the value of an appreciated home and other unencumbered real estate, sizable pension plans, and often the proceeds of life insurance policies alone may add substantially to the estate.

These assets and their value create a need to formulate a sound and appropriate financial plan—called an **estate plan**. The estate plan is an arrangement of a person's estate that takes into account the laws of wills, property, trusts, insurance, and taxes in order to gain maximum financial benefit of all these laws for the **disposition** (distribution) of the property during life and after death. If the plan is properly formed and executed, it should produce the best possible economic security for the individual and the family. The estate plan encompasses the creation of the estate, its maximum growth and conservation, and, ultimately, its distribution. It necessitates active planning strategies during the individual's life and important postmortem decisions after death. If designed appropriately, the estate plan should meet all the individual's objectives and provide (1) a comfortable retirement income; (2) financial protection for the family; (3) proper custodial care if incompetency or any serious physical or other mental health problem occurs; (4) a minimum of taxes and expenses throughout the implementation of the plan; and (5) expedient, efficient, and harmonious distribution of the estate according to the individual's wishes after death.

The development of an estate plan for the client commences once the client reaches a "comfort level" with the supervising attorney and paralegal, which allows the paralegal to accumulate the personal and financial data.

After information has been obtained from interviews and questionnaires and reviewed with the client, an estate plan is created using legal documents, (e.g., wills and trusts), and devices that save estate tax either by an increase in the deductions from the gross estate or by reducing the gross estate itself.

The next sections discuss the role the will plays in the development of an estate plan.

AN INTRODUCTION TO WILLS

Unfortunately, many people in the United States die without a valid **will**—the written declaration of a person's intended distribution of property after death. The result is they have no say in the way property they have accumulated over a lifetime will pass after they die.

Most young adults (those over 18) have few possessions, and dying is not their everyday concern. Correspondingly, in their view, neither is the need for a will. However, every adult owns some property, and most individuals want to determine to whom this property will be distributed after they die. Why then do so many people fail to make a will?

In the first place, almost everyone under 18 and adults who have a mental deficiency cannot make a will because legally they are either too young or they lack the mental health (sanity) required to create a valid will. Currently, financial planners nationwide recommend that individuals make a will as soon as they reach the age of majority, if only to give sentimental property to a favorite relative or friend. Some people fail to make a will because they are reluctant to discuss their property and finances with "strangers"; others procrastinate and then die prematurely due to an accident or unexpected illness; some do not want to discuss or face their mortality; others cite cost as their reason (although

estate plan

An arrangement of a person's estate using the laws of various disciplines (e.g., wills, trusts, taxes, insurance, and property,) to gain maximum financial benefit of all the laws for the disposition of a person's assets during life and after death.

disposition

The distribution, transfer, or conveyance of property.

will

The legally enforceable written declaration of a person's intended distribution of property after death.

attorneys generally charge minimal fees for preparing simple wills); and, finally, many people are aware that each state has laws that determine the passage of their property to family and blood relatives if they die without a will, so they allow their state to “make a will” for them. It seems no matter how much effort is spent to encourage Americans to make a will, many are not convinced or motivated to act.

POINT OF INTEREST

Oldest Known Will

In 1890, William Flinders Petrie, an English archaeologist, discovered the world's oldest last will and testament among the Egyptian pyramids. Written on a parchment/papyrus form, it was determined that the will was actually written in 1797 BC. Before this discovery, legal historians did not believe that any society had developed a legal mechanism that allowed for the distribution of one's assets upon their death but believed that the property automatically passed to the eldest living son. It is interesting to note that the will had witnesses.

Statutory Requirements for a Will

As mentioned, one reason why the young and some adults die without a will is that not everyone can legally make a will. To begin with, state laws impose restrictions on the makers of wills and on the procedures for creating a valid will. Through its legislature, every state passes laws, called **statutes**, that determine the **legal capacity** (age) and **testamentary capacity** (sanity) requirements for a person to make a will. The maker or **testator (male)/testatrix (female)** must be old enough (usually 18) and be of **sound mind** (sane) at the time the will is made.

In the case of *Matter of Yett's Estate*, 44 Or.App. 709, 606 P.2d 1174 (1980), a will was challenged on the basis that the testator lacked testamentary capacity. The court held that to determine whether the maker of a will had testamentary capacity, great weight is accorded the testimony of attesting witnesses who were present at the execution of the will. It is the testatrix-decedent's capacity at that time, not her general condition over a span of time, that determines testamentary capacity. In this case, the evidence indicated she had this capacity even though she suffered from a malignant brain tumor. The court also ruled the evidence failed to establish her illness, i.e., the tumor, had caused insane delusions that resulted in a decreased share of her estate.

statutes

Laws passed by state and federal legislatures.

legal capacity

Age at which a person acquires capacity to make a valid will, usually 18.

testamentary capacity

The sanity (sound mind) requirement for a person to make a valid will.

testator (male)/testatrix (female)

A man or a woman who makes and/or dies with a valid will.

sound mind

To have the mental ability to make a valid will. The normal condition of the human mind, not impaired by insanity or other mental disorders.

POINT OF INTEREST

How Will the Internet Affect Estate Planning?

Perhaps more Americans will consider the benefits of estate planning and preparing a will. Many estate planning services are prominently advertised on the Internet. Quizzes and self-tests can be taken on the Internet to ascertain if one needs a will. Many sites offer links to pages and/or sites that feature will writing, advantages of having a trust, minimizing estate taxes, and other related topics. Will this additional exposure to the topic of estate planning encourage more Americans to write a will? Only time will tell.

Caveat: Online access to information about wills, trusts, and estate planning is not a substitute for sound legal advice from a practicing attorney in your state.

passing to the contestant of the will. Consequently, the court ruled that the will was valid.

State statutes also establish formal requirements for the creation and **execution of a valid will**; e.g., most wills must be written, signed, and dated by the maker and attested and signed by two or three witnesses. To be properly executed, a will must conform to the laws of the state in which it is made. Each state enacts (passes) laws on the execution of wills, and these laws are not always the same. Laws differ on the method of writing that may be used (e.g., whether the will may be handwritten or **holographic**, typewritten, computer generated and printed, audiotaped, or videotaped) and on the placement of the testator's signature (e.g., whether it must be on every page, only at the end of the will, or simply anywhere on the will). Individuals who are unfamiliar with the laws of their state and try to create their own wills often make mistakes or omissions concerning their property, naming their **beneficiaries**, or attempting to satisfy the statutory requirements for a will. The result may be an unintended, incomplete, or invalid will. To become a well-trained and experienced paralegal, you need to learn and master the laws of your state so you can explain the statutory requirements, terminology, and procedures associated with wills and help clients execute a valid and meaningful will that accurately fulfills their intent and desires. *However, always be careful not to provide legal advice!*

execution of a valid will

The acts of the testator who writes and signs the will and the two or more witnesses who attest and sign it to establish the will's validity.

holographic will

A completely handwritten, signed, and usually dated will that often requires no witnesses.

beneficiary

A person who is entitled to receive property under a will or to whom the decedent's property is given or distributed.

ETHICAL ISSUE

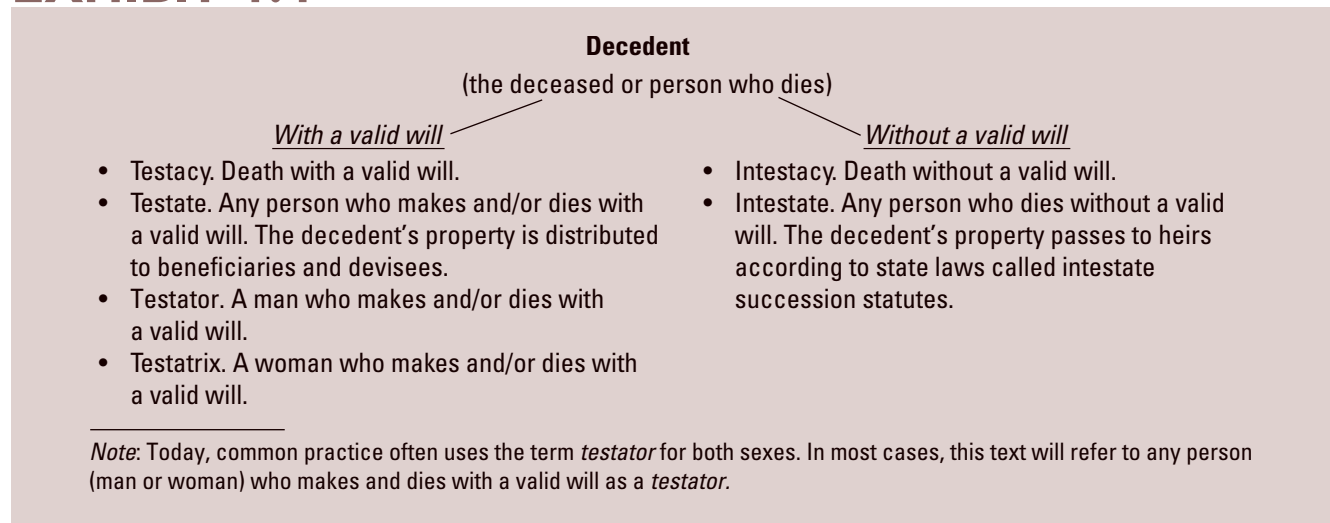
Basic Terminology Related to Wills

Before proceeding further, it will be helpful to present some basic terminology related to wills and estates. Exhibit 1.1 explains the terms used to indicate whether a person died with or without a valid will.

The following terms relate to the actual making of a will.

- **Execute.** To perform or complete, i.e., to write and sign a will.
- **Attest.** To bear witness; to affirm or verify as genuine (e.g., the witness who attests the testator's intent, capacity, and signature on a will).
- **Subscribe.** To sign one's name generally at the end of a will.
- **Witnesses.** Two or more persons who attest and subscribe (sign) the will.

EXHIBIT 1.1 Testacy versus Intestacy



Other important terms relate to the administration of the decedent's estate.

- *Estate*. Also called *gross estate*. The property accumulated during a person's lifetime and owned at the time of death.
- *Property*. Anything subject to ownership; classified as real property or personal property.
 - *Real property*. Land, buildings, and things permanently attached to them.
 - *Personal property*. Any property that is not real property.
- *Estate administration*. The process of appointing a personal representative (executor or administrator) to collect, preserve, manage, and inventory the decedent's estate; notifying creditors to present their claims; paying all the decedent's debts and death taxes due; and distributing the remaining estate property to beneficiaries named in the will or heirs according to state law if the decedent died intestate, i.e., without a will.
- *Probate*. Court procedure by which a will is proved to be valid or invalid. Probate has been expanded to include the legal process of the administration of a decedent's estate. The term is often used synonymously with estate administration. For example, the phrase "to avoid probate" means to avoid the process and procedures of estate administration. The probate process is required to legally establish the beneficiary's or heir's title to a decedent's property. The **formal probate** (estate administration) or **informal probate** is performed by the personal representative (e.g., executor or administrator) of the estate under the supervision of the appropriate court, often called the probate court.
- *Probate court*. The general name for the court that has jurisdiction (authority) over the handling or administration of a decedent's estate and the distribution of the property; also may be called chancery, surrogate, or orphans' court, depending on the state.
- *Personal representative*. The individual who is appointed by the probate court to manage the estate of the decedent and either distribute the estate assets according to a will or a state's intestate succession statute when there is no will. A personal representative includes the following:
 - *Executor/executrix*. *The man or woman named in the will to carry out its provisions, i.e., administer the decedent's estate.*
 - *Administrator/administratrix*. *The man or woman appointed by the probate court to administer the decedent's estate when there is no will.*

Other specialized types and titles of personal representatives are discussed in Chapters 7 and 8.

The following terms are used to refer to the recipients of the decedent's property.

Will Terms

- *Beneficiary*. Traditionally, a beneficiary is a person who is entitled to receive property under a will or a person who has already received the property. Under common law, a beneficiary received the personal property of the decedent by will, but today, the term is used to describe a person entitled to any gift (real or personal property) under a will. Therefore, a beneficiary can include a devisee or legatee. This definition for beneficiary will be used throughout the text.
- *Devisee*. A person who receives a gift of real property under a will; or as defined by the **Uniform Probate Code (UPC)**, the person who receives

formal probate

A court-supervised administration of a decedent's estate.

informal probate

A court proceeding of a decedent's estate with limited or no court supervision.

Uniform Probate Code (UPC)

A uniform law available for adoption by the states to modernize and improve the efficiency of the administration of a decedent's estate.

a gift of either real or personal property. Throughout the chapters of the book, relevant sections of the Uniform Probate Code will be cited.

- *Legatee*. A person who receives a gift of personal property under a will.

Intestate Terms

- *Heir*. Under common law, an heir was a person entitled by statute to receive the real property of a decedent who died intestate. Today, an heir includes persons who are entitled by statute to receive or have already received any gift (real or personal property) of the intestate. In addition, although technically incorrect, the popular use of the word *heir* has also been expanded to include persons who receive any gift through a decedent's will. However, throughout the text, the term *heir* will include persons who receive any gifts by intestate succession statutes. See comparison chart on terminology, Exhibit 3.1.
- *Distributee*. A person who is entitled to share in the distribution of an estate of a decedent who dies intestate, or as defined by the UPC, any person who has received property of a decedent from the personal representative other than a creditor or purchaser.
- *Next of kin*. The nearest blood relatives of the decedent; or those who would inherit from a decedent who died intestate, whether or not they are blood relatives (e.g., a spouse).

THE PURPOSE OF WILLS

The primary function of a will is to allow individuals to distribute their property any way they choose. A will gives the testator the opportunity to accurately describe the property owned at death and to designate to whom that property is to be distributed. Because **probate courts** (see Exhibit 7.2) closely scrutinize the language of the will to determine the testator's true intent, it is of paramount importance that no word or sentence within the will create a contradiction, ambiguity, or mistaken interpretation that could cause confusion that would change the testator's plan or, worse, invalidate the will.

EXAMPLE: In an early provision of her handwritten will, Selena Parker leaves "all my antique furniture to my best friend, Maeve Thompson." Later in the will, Selena states that she wants the furniture to go to her only daughter, Carissa. In the final clause of the will, she selects five pieces of this furniture to be given to her housekeeper. The court could declare the will invalid because of these and other contradictions.

Since the context of the general language and particular words in a will is a major factor used to determine the testator's intent, it is essential the will be carefully constructed to ensure the testator's plan for the distribution of the estate property is clearly understood. The court in the case of *Richland Trust Co. v. Becvar*, 44 Ohio St.2d 219, 339 N.E.2d 830 (1975) stated, "The function of the court in a will construction case is to determine and apply the testatrix's intention, as expressed in the language of the whole will, read in the light of the circumstances surrounding its execution."

Without a will, the statutes of the decedent's **domicile** (home state) will determine to whom the decedent's property will be distributed with the exception that **real property**, i.e., land, buildings (house, cottage, apartment, or office building), and the like, will be distributed according to the laws of the state in which the property is located. One of your major tasks and responsibilities will be

probate court

The court that has jurisdiction (authority) over the probate of wills and the administration of the decedent's estate.

domicile

The location (state) of a person's true and legal home.

real property

Land, buildings, and things permanently attached to them.


ETHICAL ISSUE
ambulatory

Subject to change and revocation anytime before death; e.g., a will is ambulatory.

codicil

A written amendment to the will that changes but does not invalidate it.

letter of instructions

A document that specifies the testator's instructions for organ donation and funeral and burial plans. It can also be an all-inclusive checklist of various personal and estate information to help the family and personal representative locate and identify property and documents necessary to administer the estate.

surviving spouse

A spouse who outlives the other.

to prepare drafts of the will and review them carefully with the client *to ensure that the final draft contains complete, accurate, and clearly understandable language to enable readers, especially the probate court, to agree on the meaning of the will and the client's intent.*

Since all wills are **ambulatory**, i.e., subject to change and revocation anytime before death, a will takes effect only after the testator dies. While living, the testator can review and modify the will whenever he wishes by the addition, deletion, or modification of gifts, beneficiaries, clauses of the will, or fiduciaries (see further discussion below under Appointment of Fiduciaries). Also, the testator can sell or dispose of any property listed in the will before death. In the past, if the modification was a simple change (e.g., adding a new gift), a **codicil** or amendment to the will was sufficient. Today, codicils have become obsolete. With the change from typewriter to word-processing software, which rapidly and easily produces legal documents, a "new will" is the preferred and more appropriate choice for any needed modification. Also, the use of a computer-generated and printed new will eliminates the serious potential problem of locating two or more documents, i.e., a will and multiple codicils. For further discussion, see Chapter 4.

In no particular order of importance, the next paragraphs discuss the testator's essential letter of instructions and some of the reasons for making a will.

Funeral and Burial Plans and the Letter of Instructions

The best and most appropriate method for individuals who preplan their funeral and burial arrangements is to include the plans in a **letter of instructions** and not in a will or codicil. One of the valuable uses of the letter of instructions is to provide a written document that identifies and explains a person's funeral and burial plans and is readily accessible for the testator's review and modification. After planning the funeral with a mortician (including costs and arrangements for a casket, church service, and reception) and purchasing a burial plot, individuals can insert these plans into the letter of instructions and make them known to their family, physician, religious adviser, and future personal representative by giving them copies of the letter. Thus, the letter avoids a frequently unpleasant, and sometimes painful, problem the family faces when a loved one dies, often suddenly and unexpectedly, and the will or codicil cannot be found or obtained before the decedent-testator's burial. The letter should not be kept in a safe deposit box. A good place to retain one's important documents is in a fireproof safe.

Preplanning and prepaying the costs of the funeral and burial takes a heavy burden off the grieving family, both economically and emotionally. Alternately, if the individuals prefer to be cremated and want to ensure that their wishes will be followed without revealing the contents of the will, they can review the letter containing the cremation plans with family members; if there are any concerns or objections, they can be resolved prior to the person's death.

Unfortunately, if a testator places funeral and burial arrangements only in the will, all such preplanning may be an exercise in futility, either because the will is not found until after the testator has been buried, or because the family simply disregards or disobeys the instructions. Since statutes in most states allow the desires of a surviving spouse and next of kin to legally supersede the plans of the testator, often the family makes the final decisions concerning the disposal of the testator's body and the type of funeral or service. The following persons generally have priority in deciding on funeral and burial arrangements including cremation: the **surviving spouse**, an adult child, a parent, an adult sibling, the decedent's guardian, and any other authorized or obligated person (e.g., a personal representative or medical examiner). All too frequently, serious disagreements arise over such questions as whether there should be a burial of the body or cremation, a denominational or nondenominational religious service, an open or closed casket, and the like.

EXAMPLE: Nathan has told his family he wants to be cremated when he dies. After his death, Nathan's family, for religious reasons, decides to have a traditional service without cremation. Often the decedent's wishes are not followed, as in this example.

Sometimes the testator's family disregards the funeral plans outlined in the will because the arrangements are too elaborate, too expensive, or unreasonable.

EXAMPLES: Xavier wants to be cremated and have his ashes flown to Paris and spread from the top of the Eiffel Tower. Anthony wants a horse-drawn carriage, 100-member band, and all-night party. Honoring such requests may deplete the estate and create additional hardships for survivors.

The above problems can best be alleviated by preplanning and prepaying the funeral and burial arrangements, discussing them with family and the funeral director, and placing them in the letter of instructions. *Caveat:* Copies of the letter must be given to the family and the future personal representative.

Even though the funeral and burial arrangements are often made by someone other than the personal representative (such as a surviving spouse or other family member), the cost of all "reasonable" expenses is paid as a priority debt of the decedent's estate according to state law, as will be discussed in detail in later chapters. It will be your job to keep accurate records of the costs and *remind the personal representative that these expenses remain "reasonable."* Personal representatives are liable to the estate if they allow these costs to become excessive due to their neglect.

If an individual intends to donate organs or remains for transplant or medical research, the donation instructions must also be included in the letter instead of a will, which may not be discovered in time to make a "useful" organ donation. Although most states recognize donor designation on a driver's license or other organ donor documentation, it may not be enough, as many organ procurement organizations and hospitals continue to seek consent from the donor's next of kin. Some states have passed legislation that seeks to avoid complications arising from a donor's next of kin opposing the organ donation. These laws generally provide that a properly executed organ donation statement, not revoked by the donor, must be enforced and cannot be overridden by any other person. Minn. Stat. Ann. § 525.9212(2) (h) is typical, providing that, upon the donor's death, an unrevoked organ donation designation is enforced and does not require the approval of, nor can it be opposed by, any other person. Even in states that call for such protection of the donor's wishes, it may still be advisable to inform the family to ensure the donor's wishes will be honored. Many states have established organ donor registries. For the most part, they are operated in participation with the Department of Motor Vehicles and provide for donor designation on the driver's license. For further discussion of funeral and burial arrangements and organ donation by the testator, see Chapter 6.

ETHICAL ISSUE

ASSIGNMENT

1.1

1. Does your state have an organ, tissue, and eye donor registry?
2. Does your state provide for donor designation on the driver's license?
3. Is online registration available for your state's donor program?
4. What policy does your state have in place for informed consent to organ donation?
5. Does your state have legislation requiring that the organ donor's wishes be carried out?