Assignment 1

Transfers of Property
PURPOSE AND SIGNIFICANCE

The basic goal of estate planning is to transfer as much of the estate owner’s property as possible to the intended recipients. This goal must be balanced with the estate owner’s needs for a comfortable lifestyle. Of course, the actual process of estate planning is much more complicated in many instances. The process involves the estate owner’s providing and implementing solutions to three critical questions—who? how? and when?—with respect to his or her property. The estate owner must determine who will receive the property, how the recipient will receive it, and when the transfer will be made. The answers will primarily depend on the estate owner’s individual goals and circumstances. However, the role of the estate planner will require that he or she have a thorough background in the laws with respect to property ownership, the methods of property transfer, and the costs—such as transfer taxes—associated with transferring property.

This assignment covers the basic structure of property ownership and transfer. It gives the student the vocabulary of estate planning. A particular emphasis is on forms of property ownership and the methods of transfer for an estate owner’s property. This discussion includes transfer of probate property through wills or intestacy. In many instances, it is advantageous to avoid probate for the property held by a client until death. The assignment reviews the methods of avoiding probate, including transfers by operation of law, contractual beneficiary designations, and transfers through living trusts.

In the discussion of probate transfers, the assignment describes the basics of wills and the specific consequences of intestacy—dying without a valid will—and points out the many advantages of a well-planned will. The assignment also covers the formalities required by the court to ensure a will’s validity. Particular attention should be given to your own state’s laws. Many individuals will not ever have a significant probate estate. These individuals will own property jointly with rights of survivorship with their spouses. These individuals will have life insurance or retirement plans payable to designated beneficiaries. In addition, several states have laws permitting financial accounts to be designated by contract to be payable at death to named beneficiaries. This assignment discusses the advantages of avoiding probate with the popular probate-avoidance techniques.

Finally, since community-property states have rules that automatically vest one-half of community property in the hands of the estate owner’s spouse, this assignment provides a discussion of community property.
Learning Objectives

An understanding of the material in this chapter should enable the student to

LO1.1 Explain when property will pass through probate or outside probate through the estate owner’s will provisions or intestacy statutes.

LO1.2 Describe the general treatment of real and personal property of a decedent who dies intestate.

LO1.3 Identify the disadvantages of dying without a valid will.

LO1.4 Explain the major advantages of a written will.

LO1.5 Describe the formalities required for a valid ordinary will regarding (a) the document, (b) the signature, and (c) the attesting witnesses.

LO1.6 Describe the challenges available to contest the validity of a will, and distinguish these from an election against the will.

LO1.7 Explain how a will may be revoked.

LO1.8 Discuss the advantages of avoiding probate.

LO1.9 Discuss the advantages and disadvantages of revocable trusts.

LO1.10 Describe how durable powers of attorney can be used in the estate planning process.

LO1.11 Indicate whether the property acquired by a couple in a community-property state is community property, separate property, or quasi-community property.

LO1.12 Explain how community property is managed in most community-property states.
REFERENCES

Henkel, *Estate Planning and Wealth Preservation* (H)—Chapter 7; Cumulative Supplement

Fontaine, “Transfers at Death”—Study guide reading 1.A


Fontaine, “Community Property”—Study guide reading 1.C

Editor's Comments
OUTLINE

1. Testamentary versus nontestamentary disposition
   a. Nonprobate transfers
   b. Intestacy laws
   c. Wills
   d. Execution formalities
   e. Capacity of testator
   f. Will revocation
   g. Will contests
   h. Spousal right of election

2. Probate avoidance
   a. Advantages
   b. Disadvantages
   c. Revocable trusts

3. Powers of attorney
   a. Durable powers
   b. Springing powers
   c. Advantages
   d. Disadvantages

4. Community property
   a. Identifying property
   b. Managing property
   c. Moving to common-law jurisdictions
OBJECTIVES AND QUESTIONS

Objective 1: Explain when property will pass through probate or outside probate through the estate owner’s will provisions or intestacy statutes.

Reference

Henkel—7.01, 7.03–7.07; Cumulative Supplement; Editor’s Comment; Study guide readings 1.A and 1.C

Answers

The following are not considered part of a decedent’s probate estate: a, c, e, and f. Also check summary item for objective 1.

Notes

Editor’s Comment. Most states have enacted statutes that permit securities to be payable at death by contract provisions through beneficiary designations. Accounts titled in this fashion permit the title owner to control the security or account normally while alive, but the transfer becomes an automatic nontestamentary transfer at the owner’s death. This type of account or security registration is available for individual ownership or joint ownership (other than by tenants in common). In the case of a joint account with payable transfer-at-death provisions, the account is transferred to the designated beneficiary at the death of the last joint owner. Selected provisions of the Pennsylvania Transfer On Death Security Registration statute are provided below.

Chapter 64 (Pennsylvania Probate, Estates, and Fiduciaries Code) Transfer On Death Security Registration

§6402. Registration in beneficiary form.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties
or as owners of community property held in survivorship form and not as tenants in common.
§6403. Law applicable to registration.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity’s principal office, the office of its transfer agent or its office making the registration or by this or a similar statute of the law of the state listed as the owner’s address at the time of registration. A registration governed by the law of the jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

§6404. Origination of registration in beneficiary form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary, which may include a trustee of a trust, to take ownership at the death of the owner or the deaths of all multiple owners.

§6405. Form of registration in beneficiary form.

Registration in beneficiary form may be shown by the words “transfer on death” or the acronym “TOD,” or by the words “pay on death” or the acronym “POD,” after the name of the registered owner and before the name of a beneficiary. §6406. Effect of registration in beneficiary form.

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on the ownership until the owner’s death. A registration of a security in beneficiary form may be canceled or changed anytime by the sole owner or all then surviving owners, without the consent of a beneficiary.

§6407. Ownership on death of the owner.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners in compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be registered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interest as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.
Questions

1. What property will pass to others outside a decedent’s will provisions or intestacy statutes without judicial administration?

2. Which of the following items will not be controlled by will provisions or state intestacy laws because they are not considered a part of a decedent’s probate estate? (a) a joint checking account with right of survivorship; (b) a residence held as tenants in common with spouse; (c) life insurance on decedent’s life payable to the spouse; (d) personal property owned by the decedent; (e) security registered in beneficiary form; and (f) qualified retirement plans.
Objective 2: Describe the general treatment of real and personal property of a decedent who dies intestate.

Reference

Study guide reading 1.A

Answers

Check summary item for objective 2.

Questions

1. What is the general treatment of real and personal property of a decedent who dies intestate?
Objective 3: Identify the disadvantages of dying without a valid will.

Reference
Study guide reading 1.A

Answers
Check summary item for objective 3.

Questions
1. List three disadvantages of intestacy.
Objective 4: Explain the major advantages of a written will.

Reference

Study guide reading 1.A; Editor’s Comment

Answers

Check summary item for objective 4.

Notes

Editor’s Comment. Joint Wills (“Will Contracts”)

Most authorities advise against the use of a joint will, which restricts the surviving spouse’s right to dispose of the property and limits disposal of property at the surviving spouse’s death to individuals or classes specified in the joint will.

Disadvantages of joint wills include the following:

- loss of the federal estate tax marital deduction (alleviated or eliminated by the federal credit amount or by QTIP rules)
- creation of questions of interpretation, which in turn lead to expensive and time-consuming litigation (problems that could be minimized if anticipated in advance)
- unexpected and sometimes costly gift tax problems
- issues as to whether the will is a valid binding contract
- issues as to the irrevocability of the contract
- issues as to whether the joint will revokes a later spouse’s claims against a decedent’s estate

There seems to be no end to the problems surrounding joint wills. The typical case involves mutual wills between spouses that contain provisions leaving the entire estate to the surviving spouse but to other devisees (the contract beneficiaries) if the spouse does not survive. The issue that continues to surface is whether or not the surviving spouse is contractually bound not to revoke his or her will. Although the central issue is usually to prove that there was a contract between the parties, a number of other issues can also arise. For instance, what property is subject to the will contract; are nonprobate assets subject to the provisions of the will? A case involving unusual facts held that if the surviving spouse did not receive property under the terms of the decedent spouse’s will, then the surviving spouse is not bound to honor the terms

Questions

1. List at least five advantages of having a will.
Objective 5: Describe the formalities required for a valid ordinary will regarding (a) the document, (b) the signature, and (c) the attesting witnesses.

Reference

Study guide readings 1.A; Editor’s Comment

Answers

Check summary item for objective 5.

Notes

Editor’s Comment. The requirements of a valid will include the following:

- intent
- capacity
- freedom from fraud, duress, undue influence, or mistake
- proper execution

Questions

1. Explain the formalities required for a valid will regarding the following: (a) the document, (b) the signature, and (c) the attesting witnesses.
Objective 6: Describe the challenges available to contest the validity of a will, and distinguish these from an election against the will.

Reference
Study guide reading 1.A

Answers
Check summary item for objective 6.

Questions
1. Describe the potential grounds for a will contest.

2. Discuss how a right of election against a will differs from a will contest.
Objective 7: Explain how a will may be revoked.

Reference
Study guide reading 1.A; Editor's Comment

Answers
Check summary item for objective 7.

Notes

Editor's Comment. Wills can be revoked by any of the following means:
- will or codicil
- other writing
- act to destroy will
- law

When should a new will be drawn and when should a codicil be used? A new will should be used when the changes are both significant and extensive. In many cases, the cost of having a codicil prepared may not be significantly less than the cost for having a whole new will prepared. Furthermore, a codicil is not always a simple solution. It must be executed with the same formalities as a will and therefore may actually complicate matters. For instance, assume that state law requires three witnesses to a will. There must then be three witnesses to a codicil. Think of how many witnesses must be found to a will with three codicils. Perhaps the most significant situations in which a new will rather than a codicil should be prepared are those in which a beneficiary has been disinherited, the size or terms of a bequest have been altered, or the estate's executor has been changed. The new will would not mention the old dispositive scheme and would therefore avoid embarrassment or needless pain.

There are circumstances in which a codicil is preferable to a will. For instance, a new will should not be drawn when the competency of the testator has been or is likely to be questioned. If the codicil is not admitted to probate because of the lack of competency, at least the will survives. A codicil is preferable over a new will when there has been a change in probate or tax law under which a will executed prior to a specified date is protected. Codicils should be considered for naming a new executor, trustee, or guardian; revalidating a will after moving to a new state (and away from the location of the original witnesses); canceling an intrafamily debt; or adding a new beneficiary.
Clients who wish to revoke a will should do so only after consultation with a qualified attorney about the act’s implications. Once it is decided that the will should be revoked, the physical act (that is, burning or shredding) should be complete to reduce the potential that beneficiaries under the revoked instrument may make claims on the estate. To make certain it is done properly (and to assure the witnessing of the act and be able to confirm the client’s intention to revoke the will), revocation should be done under the attorney’s direction and in his or her presence.

Questions
1. Discuss the categories of acts that can result in the revocation, alteration, or modification of a will, and cite an example of each.
Objective 8: Discuss the advantages of avoiding probate.

Reference

Henkel—7.01–7.02; Cumulative Supplement

Answers

Check summary item for objective 8.

Questions

1. Identify the reasons that probate-avoidance techniques may be recommended.
Objective 9: Discuss the advantages and disadvantages of revocable trusts.

Reference
Henkel—7.03; Cumulative Supplement

Answers
Check summary item for 9.

Questions
1. Discuss the advantages of revocable trusts.

2. Discuss the disadvantages of revocable trusts.
Objective 10: Describe how durable powers of attorney can be used in the estate planning process.

Reference

Study guide reading 1.B

Answers

Check summary item for 10.

Questions

1. Define durable power of attorney.

2. Define springing power of attorney.
3. Why is a durable power of attorney superior in some respects to a guardianship to manage the property of a disabled or incapacitated individual?

4. Identify the disadvantages of a durable power of attorney.
Objective 11: Indicate whether the property acquired by a couple in a community-property state is community property, separate property, or quasi-community property.

Reference

Study guide readings 1.C; Editor’s Comment

Answers

Check summary item for objective 11.

Notes

Editor’s Comment. Because of the mobility of the workforce, it is essential that all students, whether practicing in a common-law or community-property state, understand the basic principles of community-property law.

In 1983 the National Conference of Commissioners on Uniform Laws drafted the Uniform Marital Property Act (UMPA), designed to serve as a model for nationwide standardization. Wisconsin became the first state to enact a version of UMPA. Some other common-law states, have either passed UMPA or are studying some version of it.

UMPA represents a significant move toward the community-property concept. In essence it provides that the income of either spouse creates a new type of property that is shared. Under UMPA most assets are considered to be owned jointly. Management and control of marital property are shared. Both spouses are equally responsible for debts taken on for the benefit of the family under this uniform law.

Separate ownership is reserved for those items acquired (a) before the marriage, (b) through inheritance, or (c) through gifts. Couples can also hold property separately by mutual agreement.

Obviously, in common-law states UMPA will reverse the presumption that property is considered to be owned individually unless specific legal provisions have otherwise been made. At either the divorce or death of either spouse, UMPA will have great impact. (It also has implications in the area of credit, where shared ownership and responsibility for debts during the marriage establish a credit history for both spouses rather than merely for the title holder, as is
currently the case under common law.) UMPA gives both parties an equal legal claim to assets in the event of a divorce.

There are potentially complex technical problems in the area of wills and estates under the adoption of UMPA. Certainly, all estate plans of domiciliaries in common-law states that adopt UMPA must be reviewed, and many will have to be changed. Property in life insurance trusts set up to hold what was separate property may become “tainted.” Such property will be considered marital property if premiums are paid with “marital” money from a joint checking account. This may subject life insurance proceeds to extra taxation at the second death (the surviving spouse becomes a partial grantor of the trust, and assets will be includible in his or her estate under Code Sec. 2036 even if he or she holds only a life income) and may make the original dispositive scheme ineffective to some extent. It is therefore obvious that the progress of UMPA will seriously affect estate planning in the future.

The Retirement Equity Act of 1984 (REA) radically altered the beneficial interests in pension and profit-sharing plans in common-law states as well as community-property states. Traditionally, the interest of an employee plan participant in his or her accrued vested benefit or vested account balance could not be reached by either creditor or spouse. REA recognizes that the nonworking spouse has a valid and vested interest in the plan benefits created and/or accrued during marriage. There are two implications of REA.

First, a qualified domestic relations order (QDRO) may now be served on a plan administrator and/or trustee. That individual must honor the QDRO, setting aside for the spouse of the employee plan participant or giving over to him or her a share of the plan participant’s benefit under the pension or profit-sharing plan. In other words, if there is a court order, decree, or judgment that relates to either marital rights or child support and that provides payment to a spouse, former spouse, child, or other dependent (called the alternate payee), and is for an amount or percentage of a qualified employee benefit plan, the plan must honor the order. The QDRO must clearly set forth the amount of plan benefits to be paid to the alternate payee and state the manner of payment (lump sum, installments, or annuity). The QDRO cannot change the normal mode of payment of plan benefits—for example, the court order cannot direct a lump sum if a joint and survivor annuity was the normal mode of payment.

The second significant implication of REA is the automatic vesting of rights in a surviving spouse. Under REA the basic benefit under all retirement plans (except a profit-sharing trust) is a joint and survivor annuity (or if death occurs before retirement, as a preretirement survivor annuity) unless the plan participant “elects out” of the joint and survivor annuity.

The key point is that the only way a participant can elect out of a joint and survivor annuity is with the spouse's written (informed) consent that is notarized or witnessed by the plan
administrators and/or trustees. The surviving spouse cannot be disinherited by merely naming a different beneficiary; a plan participant can no longer cut the surviving spouse out of a pension death benefit without his or her consent. Therefore, national tax law has amended (perhaps unconstitutionally) state probate and property law.

In essence, federal law has created a form of community property in all states. This is particularly important in planning second marriages and in drafting antenuptial agreements. Such agreements should provide for the full or partial waivers of the benefits of the second spouse in pension and profit-sharing plans. For the waiver of benefits to be effective, the second spouse must execute simultaneously with the antenuptial agreement the consent to the spouse-participant’s election out of the joint and survivor annuity mandated under REA.

A federal district court held an antenuptial agreement was not—per se—sufficient to override ERISA requirements. Hurwitz v. Sher, 789 F. Supp. 134 (S.D.N.Y. 1992) holds that the failure to complete forms mandated under Code Sec. 417 will thwart the personal expectations as well as the estate planning of a client. Planners should therefore be sure that clients sign both the antenuptial agreement and meet the five “consent” requirements:

1. The affected spouse must consent to the employee’s elections to waive the affected spouse’s survivorship rights.
2. The election to waive a QJSA (qualified joint-and-survivor annuity) or QPSA (qualified preretirement survivor annuity) must name a specific beneficiary (or form of benefits), which cannot be changed without spousal consent, or the spouse’s consent must specifically allow designations by the employee without further spousal consent.
3. The consenting spouse must acknowledge the effect of the election.
4. The consent must be in writing.
5. The spouse’s consent must be witnessed by a plan representative or a notary public.

See Metropolitan Life Insurance Company v. Wheaton, 1994 US APP LEXIS 35113, for a case in which a court enforced a QDRO even though the asset involved was group term life, a welfare plan, and not a qualified retirement plan interest. The court enforced the QDRO, even though the divorce decree did not meet the strict tests of a QDRO.

Questions

1. For each of the following situations in which property was acquired by a husband and wife who are residents of a community-property state, indicate the ownership of the property:
   (a) Real estate was acquired from the husband’s salary earned after marriage, and title was
placed in his name. (b) After marriage, the wife inherited listed common stock from her mother’s estate. (c) The husband owned a boat prior to the time of marriage.
Objective 12: Explain how community property is managed in most community-property states.

Reference

Study guide readings 1.C; Editor’s Comment

Answers

Check summary item for objective 12.

Notes

Editor’s Comment. The concept of community property can be important even if you don’t currently practice in a community-property state. People are more mobile these days than they used to be. Executives move into, out of, and again into community-property states. Property acquired while residing in a community-property state is generally community property. Unless converted, separate property brought into a community-property state remains separate property.

Separate property can be inadvertently converted to community property by commingling it to such an extent that it cannot reasonably be traced back to its original source. In that case it becomes community property. If this is not the result your client wants, steps must be taken to maintain the form of ownership intended.

Note that community property is usually subject only to the debts of the community. Generally, however, a spouse’s community interest can also be attached for that spouse’s separate debt, but then only after his or her separate property has been depleted. As a result, the community acts as a buffer, protecting at least half of the marital assets from attachment for the other spouse’s separate debts.
Questions

1. Explain how the following are managed in most community-property states: (a) real property and (b) personal property.
SUMMARY

Objective 1

Explain when property will pass through probate or outside probate through the estate owner’s will provisions or intestacy statutes.

Whether a person dies testate (with a will) or intestate (without a valid will), certain property includible in the gross estate will pass (or may have already passed) to others outside the will or the intestacy statutes—that is, by contract or operation of law or by gift and without judicial administration of the property. For example, named beneficiaries of life insurance receive death proceeds by contract. Designated beneficiaries of qualified plans, IRAs, or other employee benefits will also receive the property directly at the participant’s death by contract. Similarly, a surviving tenant of property held in joint tenancy with right of survivorship will receive the property automatically by operation of law. Finally, securities or other accounts registered (where local law permits) transferable or payable at death will be paid directly to the designated beneficiary at the owner’s death.

Property passing through probate will include property titled solely in the decedent’s name or in joint name when there is no right of survivorship, such as in a tenancy in common. Thus, many married individuals will not have significant probate property since most property will often be titled jointly or payable by beneficiary designation to the surviving spouse. However, planning to manage or avoid probate property will have to be performed for the survivor of a married couple since the property inherited from the first spouse to die will be individually owned.

Objective 2

Describe the general treatment of real and personal property of a decedent who dies intestate.

With the exceptions noted in the summary item above, unless an individual has made a validly executed will, intangible personal property will pass in accordance with the intestacy statutes of the state where the decedent was domiciled, and real property will pass under state intestacy statutes of the state in which the real property was located.

The disposition of property under the various state intestacy statutes differs somewhat from state to state. The typical intestacy statute might dispose of property in the following manner:

- If only a spouse and parents survived the decedent, the spouse would take one-half of the estate and the parents would divide the other half equally.
• If only a child or children survived the decedent, each child would take an equal share.

• If only a spouse and one or more children survived the decedent, the spouse would take one-half of the estate if only one child survived (with that child taking the other half), and one-third if two or more children survived (with the children taking the other two-thirds equally).

• If only parents survived the decedent (no spouse or children), the parents would divide the entire estate equally between themselves.

Objective 3

Identify the disadvantages of dying without a valid will.

Among the disadvantages of allowing property to pass under the laws of intestacy rather than by will is that a surviving spouse will be entitled to only a limited share of estate assets. Ordinarily, the share will range from one-third to one-half of the probate estate. Children will be treated equally, despite possible unequal needs. The court will make its own selection of fiduciaries, such as the administrator and a guardian. The administrator will be required to post a bond, thus increasing costs of administration. Estate taxes are likely to be higher for the family as a unit, since there will be no specific marital deduction planning or other tax planning. For example, the probate property cannot be passed to a qualified charity if the estate owner dies intestate. For these reasons it is best that an individual have a will.

Objective 4

Explain the major advantages of a written will.

With a will a testator can decide not only who, but also how much, how, and when regarding distributions and beneficiaries. The testator’s personal property can be distributed through specific bequests. The testator can nominate an executor and guardian of a minor’s person and property. In so doing, costs may be eliminated by specifically waiving bond requirements. Moreover, the executor’s powers can be expanded. For example, the executor may legally be permitted to continue a business that might otherwise be forced into liquidation. Or the executor can be directed to distribute personal property according to a written memorandum. The executor is often empowered to make binding decisions concerning the distribution of personalty if the heirs cannot agree among themselves.

The testator can employ trusts and designate the powers to be given to the trustee and beneficiary. A specific will provision can be included to deal with the problems of a common disaster. In the case of larger estates, the most certain event to occur is the payment of federal estate
and/or state death taxes. Through a will the testator has the advantage of being able to determine how such taxes will be apportioned (that is, what person's share pays what portion of the tax). Furthermore, with a will the desired amount of the marital deduction can be planned for with the most appropriate property going to the spouse. Through the use of a QTIP trust, the executor's election or nonelection to qualify for the marital deduction will give the executor and heirs postmortem flexibility. The nonmarital property can be transferred through a credit shelter trust to provide the spouse with an income during lifetime without giving rise to additional death costs following the surviving spouse's death.

**Objective 5**

Describe the formalities required for a valid ordinary will regarding (a) the document, (b) the signature, and (c) the attesting witnesses.

Only the ordinary will is recognized in all states, and only the ordinary will is applicable to all the testator's property (real, personal, and mixed). However, for a will to be acceptable by a court, the will must meet statutory formalities.

An ordinary will must be in writing, whether it be typewritten or in pen or pencil, regardless of the language used. It must be signed and dated by the testator at the end of the will, although a proxy signature properly witnessed at the testator's direction will suffice in most states. Most states require an ordinary will to have two subscribing witnesses, and some states require three. The testator may request those persons to bear witness to the fact of mental capacity, the absence of coercion, and the execution of the will. The witnesses indicate their attestation by a signature or mark in the presence of the testator. In some states their signature or mark must be made in the presence of one another. Self-proving wills are governed by state law and will permit the execution of the will in the presence of a notary who acknowledges the execution and witnessing of the testator and the witnesses. The self-proved will eliminates the need for the witnesses to come into probate court to prove the will by verifying their signatures. A self-proved will can simply be presented to the register of wills to initiate the probate process.

**Objective 6**

Describe the challenges available to contest the validity of a will, and distinguish these from an election against the will.

In order for a will to be valid, the testator must have the testamentary capacity to execute a will. The testator must be of statutory age (generally 18) and have sufficient mental capacity to execute a will at the time of its execution. In most states testamentary capacity is present if the testator is capable of three mental acts at the time the will is executed: First, the testator must
know the extent and value of his or her property. Second, the testator must understand who are the natural objects of his or her bounty. Third, the testator must be able to retain those facts and formulate them into a specific plan for disposing of the property.

The validity of a will may be contested by anyone who will be directly benefited by a setting aside of the will. These persons normally include heirs at law or beneficiaries under a prior will of the decedent. The main grounds for a will contest are lack of proper execution, insufficient testamentary capacity, undue influence, fraud, and mistake. For the will to be valid, the testator must not have been influenced to execute the will against his or her wishes; nor should the testator have been deceived—whether it be fraud in the execution or fraud in the inducement. Note that when only part of a will results from undue influence, fraud, or mistake, in many states only that part of a will is invalid—unless it is impossible to separate the will into valid and invalid sections.

In most states if a testator attempts to disinherit a surviving spouse, the spouse will have a statutory right to elect to take the equivalent of an intestate share, regardless of the terms of the will. Thus, an election against the will does not contest the will’s validity but simply enforces the statutory inheritance rights of the decedent’s spouse. This is called a right of election. Similarly, a child born after the execution of a will (including a child born after the testator’s death) will be entitled to the intestate share when no provision is made for after-born children in the will.

**Objective 7**

Explain how a will may be revoked.

An ordinary will is not irrevocable; revocability is a main characteristic of a will. Revocation of a will occurs when the testator intentionally destroys or intentionally but unsuccessfully attempts to destroy the will by a physical act, such as burning the will. A will may be revoked in whole or in part by operation of law. An example might be the testator’s subsequent marriage or divorce. However, these rules vary from state to state. A will may be revoked by the execution of a subsequent will but only insofar as the latter is inconsistent with the former. An example of a complete revocation is a later valid will that expressly revokes all prior wills.

**Objective 8**

Discuss the advantages of avoiding probate.

Probate avoidance can have substantial benefits in some circumstances. As with most planning techniques, it is necessary to examine the client’s goals and determine whether probate will be a significant problem in an individual situation. One advantage to probate-avoidance
techniques is privacy of disposition. If an asset is not subject to probate, the asset will not have to be included in the inventory filed as a public record in probate court. Another advantage is that assets not subject to probate will avoid some expense, time delays, and the complexity of court-supervised proceedings. The costs of probate will depend on the jurisdiction in which the property is probated. In many instances, the probate process can be streamlined for smaller estates. If the estate is complex, it may be a lengthy period of time before assets can be distributed to the heirs.

A third advantage of certain nonprobate vehicles, such as revocable trusts, is the ability to provide for asset management during the incapacity or disability of the property owner. If there are appropriate successor provisions, the trustee of a revocable trust will manage the property for the grantor should the grantor lack capacity. Fourth, in some instances the nonprobate transfer of property at death will avoid the creditors of the estate. Finally, nonprobate assets may permit the property owner to transfer property free of a will contest or elective share. Please note that creditor protection and protection against such contests or elections will depend upon the type of transfer and state law.

Objective 9

Discuss the advantages and disadvantages of revocable trusts.

A revocable living trust is a trust established during the grantor’s lifetime in which the grantor has reserved the right to alter, amend, revoke, or terminate the trust. This type of trust becomes irrevocable upon the death of the grantor (in some states, such as Pennsylvania, all trusts are irrevocable unless the grantor specifically reserves the right to revoke the trust). A revocable trust may become irrevocable upon the grantor’s incompetency.

The revocable living trust has a number of potential advantages:

- The need for a will is diminished if all probate assets are placed in the trust during the grantor’s lifetime (although as a practical matter a pour-over will should be executed to catch assets that have not already been added to the trust by the date of the grantor’s death).
- The dispositive arrangements in a trust (unlike a will) are not a matter of public record. Note that if a will mentions the trust, the trust can no longer be kept private. Furthermore, parties named in the trust document are privy to the trust’s terms.
- A trust serves as a unifying receptacle for the collection of assets from a variety of sources.
• Probate costs can be reduced or eliminated. But note that if executor’s commissions would not have been claimed anyway and if attorney’s fees are not based on the size of the probate estate, this advantage is mainly illusory. Furthermore, the immediate and higher cost of establishing a revocable trust, transferring title to assets to it, and administering it must be considered.

• Delays inherent in the probate process can be reduced or avoided, and the cost and trouble of judicial supervision can be eliminated. This makes assets and income available for family members without interruption.

• Guardianship proceedings can be avoided if the grantor becomes disabled or mentally incompetent. A funded revocable trust is more flexible than a durable power of attorney. Most important, a client can designate “step-up” fiduciaries to manage and invest property, but the client can retain control until such time as he or she chooses.

• In some states a revocable living trust can avoid an election against the will. Note that many states have expanded the classification of assets that are subject to the elective right of a surviving spouse, and therefore a revocable trust will not protect assets in such a trust.

• In some states an individual cannot make a gift to a charity within a specified time (typically 30 days) prior to death but can circumvent the rule by making the gift through a revocable trust.

• Placing assets in a revocable trust makes a will contest more difficult since the trustees have the right to use trust assets to defend the attack, whereas in a will contest neither side has access to estate funds until the validity of the will is determined. In some states it is more difficult to challenge a revocable living trust than a will.

• It may be possible for a client to select the state law that will govern the construction of clauses and the administration and distribution of trust assets. This is not often possible in the case of a will that is typically governed by the law of the domiciliary state. The biggest disadvantage of a revocable living trust is not really related to the trust itself but to the mind-set with which revocable trusts have been promoted. The public has been led to believe that the use of such trusts is a panacea that will solve all their planning problems and that if they rip out a page from a book and sign their names, all their problems will be solved.

Other disadvantages include the following:

• Transferring certain tax-sensitive assets to the trust may create tax problems. Examples are S corporation stock (no problem during the grantor’s lifetime but at his or her death the ownership of S corporation stock by the trust may cause a forfeiture of the S election), stock in a professional corporation (which cannot be held in a revocable
living trust), and Sec. 1244 stock (stock owned by a revocable living trust will not be allowed ordinary loss treatment).

- No estate, income, or generation-skipping transfer taxes can be saved by a transfer to a revocable living trust at either the state or the federal level.
- A complex trust is allowed only a $100 personal exemption.
- The deduction allowed to estates for the amount of income permanently "set aside" for charitable purposes is not allowed to trusts.
- The use of a trust to hold all estate assets entails significant costs and trouble transferring the title to assets to the trust, revising the will to create a pour-over provision, and filing Form 1041 (fiduciary income tax return) unless the grantor is also the sole trustee.
- If trust property must be sold, third parties may not recognize the trustee's authority to sell the property. This may require producing and public filing of the trust instrument.
- If the grantor moves to another state, a new trust may be required to comply with the new state's laws.

A revocable living trust is a useful estate planning tool but only when used in conjunction with an overall plan and only when used by a knowledgeable planner.

**Objective 10**

Describe how durable powers of attorney can be used in the estate planning process.

A power of attorney is an agreement creating a principal-agent relationship. A durable power of attorney is a power of attorney that does not terminate upon the legal disability of the principal. An immediate durable power of attorney takes effect immediately upon the execution of the document. A springing power of attorney, which is not authorized in all states, will take effect only upon the happening of the future event, such as the disability of the principal. When a springing power of attorney is used, it should clearly specify how the disability of the principal will be determined. The powers of attorney will terminate upon the principal's death.

Ordinarily, a guardianship has to be created in court and administered under court supervision to manage the assets of a disabled individual. Durable powers of attorney are less expensive and cumbersome to administer. In addition, the durable power of attorney permits the agent (may also be called an attorney-in-fact) to aid in the probate and estate planning of the principal—for example, to add property to the principal's revocable trust or to continue to make gifts of the principal's property to the next generations.
Unfortunately, durable powers of attorney are not without disadvantages. One major problem is that third parties often refuse to honor the power. It is often recommended to ask financial intermediaries holding the principal’s assets if the principal should execute a form acceptable to such third parties. Of course, a new power of attorney can be executed only if the principal has the requisite capacity. It may be necessary to initiate court proceedings to gain compliance of all third parties. In addition, the gift-giving provisions of a specific power of attorney should be carefully planned and drafted. The IRS will generally fail to permit annual-exclusion gifts provided through powers of attorney unless the gifts are specifically authorized in the document. In addition, the gift-giving powers provide the agent with an opportunity to severely diminish the grantor’s estate. The agent’s trustworthiness should be carefully considered.

**Objective 11**

Indicate whether the property acquired by a couple in a community-property state is community property, separate property, or quasi-community property.

Most community-property statutes define community property by first defining separate property and then defining all other property as community property. Generally, separate property is property owned by either spouse before marriage, as well as any property acquired after marriage by gift, bequest, devise, or descent, together with rents and profits from such property. All other property acquired by either spouse after marriage is considered community property. Therefore, the real estate acquired from the husband’s salary after marriage is community property. The stock the wife inherited after marriage and the boat the husband owned prior to marriage are both separate property.

**Objective 12**

Explain how community property is managed in most community-property states.

In most community-property states the husband and wife jointly manage real property and both must join in the execution of any deed. In some states the husband is traditionally the manager of the personal property and his discretion is absolute, although he cannot defraud his wife of her rights. The wife controls the personal property to the extent that she can validly contract for necessities.
READING 1A: TRANSFERS AT DEATH

Property is transferred at death by one of several methods. It can pass under the terms of a validly drawn will. Property may also be transferred or assigned by contract designations in, for example, life insurance policies and antenuptial and postnuptial agreements. Finally, property may pass by operation of law. Jointly owned property with right of survivorship falls into this category, as does property passing by intestate succession.

Transfers by Will

Introduction

A will is a personal declaration of one’s intentions regarding the disposition of property at death. It describes matters to be taken care of after death. It becomes legally enforceable at death and is not operative until that time. Prior to one’s death, a will may be amended, revoked, or destroyed by the maker at any time.

If an individual dies without a will, he or she is referred to as dying intestate. If you die without a will your property will still transfer to someone else. Your property will transfer by contract, trust, or operation of law. Any property not covered by a will, contract, trust, or other operation of law mechanism (like survivorship interests) will pass by way of the state’s succession laws. State succession laws vary dramatically and they determine how property passes to your heirs when you die intestate. Lastly, to die testate means to die with a valid will.

Wills

• testate—dying with a valid will
• intestate—dying without a valid will

executor/executrix

Wills are not a one trick pony. In fact, wills can accomplish a tremendous number of goals. Wills can help you manage, dispose, and control your property after your death. A properly drawn will can assure the orderly and sound distribution of an estate. Because all property not transferred by contract or operation of law must be transferred through probate, the will becomes the estate plan for all probate property. Writing a will allows the decedent to name a personal representative of his or her choice, who is called an executor/executrix. If an executor or executrix is not named, the probate court will appoint a personal representative called an administrator to handle your estate. There is usually a security bond requirement, often called a surety bond or executor bond. The surety bond can help the value of the estate avoid loss
due to the wrongful actions of the executor. The price of the bond can vary depending on the value of the estate, credit worthiness of the executor, and state requirements. However, many wills waive the requirement of the bond, reducing the cost and burden of acting as an executor. However, in a very large and complex estate, it could be a good idea to keep the bond requirement or even plan for further insurance coverage through the will. The decedent also has the flexibility through the will to name a successor executor should the named executor be unable or unwilling to serve. Those matters can be attended to privately without court intervention. The will should also discuss the authority and power of the executor, a process for removal, a successor executor, and executor compensation.

**Fiduciaries of Estates**
- executor/executrix
- personal representative
- personal administrator

A carefully drawn will contains positive directions and instructions to the executor. An executor is someone chosen by the decedent who is responsible for administering the estate. The executor should be an individual or corporate fiduciary who is competent to perform the required duties and whom the testator can trust. The testator can give the executor broad powers and discretion with respect to the management and distribution of the estate. It is as if the executor steps into the decedent’s shoes during the estate administration period. The executor is charged with the following duties:

- gathering the assets of the estate
- probating the will
- filing tax returns
- paying taxes and other debts of the estate
- providing interim support for the beneficiaries
- settling the decedent’s business interests
- collecting benefits and income due to the estate
- filing an accounting with the probate court (also referred to as orphans’ court or surrogate’s court in some states)
- distributing property to intended beneficiaries
- closing the estate

While form documents can be used to help develop a will, no two wills should be the exactly same. People often have different planning objectives, needs, desires, and assets. Additionally,
the requirements for wills vary from state to state. If you relocate in retirement or at any point in your life you should have an attorney review your will to make sure it is still valid and enforceable in your new state.

Contents of Wills

exordium clause

A will is a legal declaration of a person's intended disposition of property. The beginning usually includes a statement by the testator regarding the testator's intention of domicile. This is often referred to as an exordium clause. An exordium clause identifies the testator, his or her location, and desire to create a valid will. The statement usually reads: "I, John Jones of Marion County, Indiana, declare this to be my last will, hereby revoking all former wills and codicils." Thus, John Jones has declared himself to be a resident of the state of Indiana. The statement implies that he wishes his property to be governed by Indiana law. This statement is particularly important if the testator owns residential real estate in more than one state. Additionally, it is usually helpful to have a clause revoking all prior wills even if you did not actually draft another will at any point. This can help cut down on fraud and other issues. A will should contain clear, positive directions. A will is usually looked to for guidance as if the testator were present directing the disposition of the property.

Contents of a Will:

1. Statement of ownership (i.e., its your will)
2. Statement of domicile
3. Revocation of all prior wills
4. Establishment of an executor
5. Alternate or successor executors
6. Executor bond requirements
7. Executor compensation clause
8. Statement of executor powers
9. Survivorship clause
10. General and specific property bequests
11. Residuary bequests
12. Guardianships
13. Payments of debts and taxes
14. No-contest clause
15. Savings clause
16. Burial directions
**precatory language**

**bequest**

A will may contain directions regarding burial or cremation, perpetual care of a gravesite, and payment for a tombstone or memorial plaque. However, these burial decisions should also be placed elsewhere since the will is often not consulted until after an individual is buried or cremated. If there are specific bequests, they are usually made early in the will. These bequests may be made to individuals or charities in specific amounts or of specific objects. When a testator wants some possessions to pass to specific persons but realizes that his or her current wishes may change, the use of precatory language in the will may solve matters. **Precatory language** is a written expression of the testator’s wishes regarding specific matters. Precatory language in a will usually states that the testator has preferences and wishes concerning his or her personal effects. The will may even mention a separate list or letter that identifies particular items and desired distributions. Although the separate writing is not part of the will, it is kept with the will. The testator is then able to alter the list or letter as necessary. Although the executor is not bound to carry out the specific preferences, the separate writing provides guidance. Alternatively, a testator may create a list of certain personal property items and name the intended beneficiaries. If the testator’s state of domicile permits, the will may dispose of the personal property by reference to the list. If nothing more, such a list may, in a sense, serve as moral direction to the beneficiaries and reduce disputes by explanation of the testator’s wishes. State law should always be reviewed prior to using precatory language. Property passing to others under a will may be referred to as a **bequest**.

Bequests may be made in one of four ways:

- bequests of specific property
- bequests of cash
- bequests of cash to be paid from a special source
- bequests that are paid out of the residue or from what remains after all other legacies and expenses have been paid

**Example**

An unmarried individual with several friends may make many specific bequests of cherished objects, cash, and intangible personal property. The testator may then direct that the residue of the estate be given to several charities after payment of all expenses and taxes. In other words, the charities will get what is left rather than receiving specific gifts. A will may also be written the other way, with a specific gift to a charity made before the residue is distributed.
Also found in the early part of the will is a paragraph directing the disposition of the decedent’s tangible personal property, including the transfer of automobiles and automobile insurance. An executor is usually given broad discretion either to dispose of tangible personal property that is not usable or to allocate such property among the beneficiaries at the executor’s sole discretion if agreement cannot be reached among them. You will also want to make sure you have a survivorship clause in the will that ensures your bequests only go to those individuals that survive you. In some cases you might not want this and will want the property to transfer to your brother’s family even if he died. So if that is the case, make sure the will fits your individual bequest needs.

**ademption**

It may happen that the decedent does not have sufficient assets to make all the bequests provided for in the will. The state statute provides the order in which bequests are to be abated or satisfied if there are insufficient assets for all of them. In addition, if the decedent disposed of a particular piece of property that was the subject of a specific bequest, the issue of ademption arises. The legatees of that bequest get nothing unless the will contains a provision to substitute other property.

After taking care of specific bequests and tangible personal property, the residue of the estate is distributed. This provision may or may not include the disposition of specific real estate or of a business interest that may be treated separately. If the residue of the estate is made payable to a trust, the direction is contained in the residuary clause.

In a will, the testator designates an executor, a successor executor, or coexecutors. A will usually contains clauses that give the executor specific and general powers, such as the power to pay the taxes and debts of the decedent as well as the taxes and debts of the estate, the power to collect life insurance proceeds payable to the estate, and all other powers that an executor must have over the property to make the appropriate transfers and distributions. As noted elsewhere, it is customary for the will to contain a clause stating that the executor may serve without bond.

A will may also contain a clause stating that the testator either exercises or declines to exercise a power of appointment, if such a power of appointment has been granted to him or her. Carefully drafted powers of appointment often require that they be specifically exercised or waived within the donee’s will. However, if a testator is the holder of a power of appointment, his or her wishes in regard to this power should be expressly set out in the will. This prevents an inadvertent exercise of the power if it is imperfectly drafted.
Another useful type of provision is one directing that the executor hold any assets for the benefit of minors or incompetents, or transfer these assets to the individuals responsible for caring for such disabled persons.

There is no question that having a valid will has many advantages in comparison to intestacy. However, a will rarely provides all the guidance the decedent’s executor and surviving relatives may need. Typically, there are many questions to be resolved that are not addressed in the will. To help solve this problem a testator can also leave additional written instructions to help answer anticipated questions.

One area that is sometimes in doubt involves funeral arrangements. It is not uncommon for surviving loved ones to differ as to what the deceased wanted in terms of burial. Did the decedent want a memorial service, cremation or burial, open casket or closed casket?

These are just some of the questions that routinely arise. If the decedent had the foresight to prepare a separate document stating the desired funeral arrangements, there would be no doubt or decision-making for grieving relatives. The instructions could include the names of the individual(s) the decedent would like to speak at a service, the clothing the decedent wishes to be buried in, the amount of money to be spent, the name of the funeral home, type of religious service, and so forth.

It is also useful for the instructions to include the names and phone numbers of the decedent’s lawyer, doctors, accountant, broker, insurance agent, veterinarian, plumber, electrician, and lawn care service, as well as insurance and pension plan information. A written inventory of assets, location of assets, value of each asset, length of time owned, and instructions regarding the assets (such as directions about investments or family business) is certain to help the executor and family.

For instance, a decedent may have owned some furniture or artwork that only he or she knew was quite valuable. The article may be gifted, thrown away, or sold for far below its true value by an unknowledgeable family member or executor. An inventory and instructions relieve the burden on the survivors to guess what the decedent would have wanted and help to preserve family harmony during an often stressful time.

If you are concerned about heirs challenging your will, you can add a no-contest clause. The no-contest clause basically removes the heir from any inheritance or gives them a nominal amount, even sometimes $1, if they challenge the validity of the will or their share of the property. No-contest wills do not work well if you leave someone out entirely as there is no downside to the challenge. However, they can work well for someone that stands to lose money if they challenge the will and fail. Some states have restrictions on no-contest clauses, allowing for contests in good faith and under other circumstances.
Make sure you also have a residuary clause which catches any assets that were not distributed elsewhere in your estate or will. Sometimes you can use this residuary amount to pay estate costs or taxes. Additionally, you could roll this money into a testamentary pour-over trust in order to manage and distribute the property. At the same time, you should make mention of where and how you want debts, taxes, and creditors paid from your estate.

In addition to distribution of property, the will can also be an appropriate place to name a guardian and successor guardian for your minor children. While the court is not bound by your recommendation, the will carries a lot of weight in determining the guardian for your minor children.

A savings clause can also be useful, depending on the state, to eliminate any language and fix the will if there is a defective portion without destroying the validity of the entire will.

**Advantages of a Will**

It is only by will that an executor of choice can be named. The will also may provide that an executor shall serve without posting a bond or other security in order to perform his or her duties. Under a will, a decedent may transfer real estate, stock, or business interests as he or she wishes. The decedent can direct disposition of tangible personal property separately from the residue (the part of the estate that remains after all other gifts have been made). The decedent can also assure the maximum marital deduction desired for property passing to a spouse. The estate’s share of the tax burden can be specified. In the absence of an instruction regarding payment of taxes, state statutes will generally allocate the expenses of the estate, including federal estate taxes, to the residuary share of the estate—that is, the residuary beneficiaries—in proportion to their respective inheritances. This means that the beneficiaries bear the tax burden proportionately. For example, both federal and state law could empower an executor to collect federal estate taxes from the named beneficiaries of life insurance policies included in a decedent’s gross estate. Alternatively, by inserting a tax apportionment clause in the will, the decedent has the power to direct the source of tax money. A direction could also be given that taxes are to be paid from the residue of the estate to relieve the marital share or specific bequests of the tax burden.

A guardian may also be designated to care for minor children or other legally incompetent dependents. A will may contain trust provisions to protect the interests of beneficiaries from their creditors. Trusts under a will can be created to control the management and timing of the distribution of income and principal from the estate. Executors and trustees can be given broad powers to invest and manage property.
Wills give testators the ability to leave their property as they choose and not as the state dictates. Testators have the ability to name charitable beneficiaries in their wills. They can make gifts to anyone they choose regardless of the relationship. In writing wills, testators may also disinherit someone who would otherwise take under the intestacy laws.

**Advantages of a Valid Will**
- avoid intestacy laws
- control
- choice of executor
- waiver of executor requirement to post bond
- distribution of property to chosen beneficiaries
- transfer of property to charity
- maximum advantage of marital deduction
- direct source of property to pay death taxes
- designation of guardian for minor children

Testators can designate orders of survival of themselves and their spouses in the event of a common disaster. This prevents the loss of the marital deduction and avoids potential additional taxation. Of course, it must be assumed that a will has been validly drawn and executed to obtain the above advantages.

**Requirements of a Typical Will**

While most wills are professionally drafted and executed under the guidance of an attorney, other types of wills may be acceptable as valid under state law if they conform to certain formalities and statutory requirements. Other kinds of wills are holographic and nuncupative wills, and the requirements for them are discussed later in this chapter. A primary requirement of all written wills is that the instrument be signed at the end. All writing after the testator’s signature or mark, other than the acknowledgment of witnesses or a self-proving provision, is not recognized as part of the body of the will. In addition to the testator’s signature, a will should be dated. Many states require witnessing the signing of the will by two or three competent people. To prevent the possible voiding of an inheritance, a beneficiary with a financial interest should not be a witness to the signing of a will. Most, but not all, states require a will to be witnessed at the time of execution. However, all states require some attestation by witnesses when the will is admitted to probate. The attesting witnesses must swear that they are familiar with the testator’s signature and that the signature at the end of the document is the testator’s true signature. The date, testator’s signature, and witnesses are the three most common will requirements by states. However, some states will require more information like a clause distributing property or a clause stating that it is your will.
**General Will Requirements**

- signature of testator at end of document
- date
- witnesses
- testamentary/legal capacity of testator at time will is executed (not at death)
  - age of state majority
  - mental competence

**self-proving provision**

Many states have passed laws that permit self-proving provisions at the end of wills. A **self-proving provision** eliminates the need to locate attesting witnesses at the time of probate. At the time of execution, the witnesses sign a notarized acknowledgment that they saw the testator sign the will and that the testator was of sound mind as well as competent to execute a will at that time. However, remember that just because a will has been notarized does not mean that the will is a valid will. Notarization indicates that the will is self-proving.

**Testamentary Capacity**

**testamentary capacity**

State laws strictly prescribe the conditions necessary for a valid will. The maker or testator (another name for the maker) must have the legal capacity to make a will. Legal capacity pertains to age and mental competence. In some states, the person making a will must have reached the age of majority. In other states, the age may be considerably younger. The testator must be of sound mind, which means that he or she understands what is being done. In other words, the testator knows that he or she is writing a will. The testator must have both recognition and knowledge of the property that he or she possesses and intends to dispose of by a will. The testator must recognize relatives and friends who are the natural objects of his or her love and affection. Lastly, the testator must understand how and to whom the property is being distributed. All of these combined attributes, called **testamentary capacity**, are measured as of the time the will is written. The document is considered valid if the testator understood what he or she was doing when it was written, even if the testator is mentally incompetent at the time of death.

**Pre-Will Considerations**

- Use your full name even if you are generally known by one or more nicknames. Nicknames can be mentioned in parentheses after your legal name.
- Name the person to be nominated as your executor. Ask the nominee if he or she is willing to be your executor prior to creating your will.
- Name at least one alternate executor in case your original nominee is unable or unwilling to serve at the time of your death.
- Decide if your executor should post bond or whether the bond requirement is waived.
- List your assets that will pass by the terms of your will. (Note that property that passes by operation of law—for example, property titled jointly with right of survivorship—or by contract—for example, property having beneficiary designations such as life insurance policies—cannot pass under your will.
- Decide if there are specific assets you wish to leave to specific beneficiaries.
- List the names and relationships of beneficiaries of your assets. Decide to whom your property passes if one or more named beneficiaries predecease you.

Modes of Distribution Under Wills

There are two common forms of distribution for the property of a decedent. Distributions may be made *per stirpes*, which means “by roots or stock,” or *per capita*, which means “by the heads.” This distinction becomes particularly important when an individual bequeaths property to children and one or more of those children dies survived by children. However, per stirpes, per capita, and with representation are only important when a class beneficiary group was used and one or more members of the class predeceased the testator. If all members of the class are alive, you just split up the assets equally among the class. However, if one or more members die, you need to determine how to split up the assets and if you want any assets to go to the deceased class member’s heirs.

*per stirpes distribution*

*per capita distribution*

*per capita with representation distribution*

*Per stirpes distribution* provides that members of a designated class, including deceased members, inherit as members of the class. Per stirpes comes from Latin, meaning “by or through the roots.” Representatives (heirs) of a deceased member take the decedent’s share by representation of the deceased ancestor, not as individuals. *Per capita distribution* provides that members of a class, including heirs of deceased members, share in the inheritance as individuals. Essentially per capita treats all surviving beneficiaries as equals. *Per capita with representation distribution* (12 states use) requires the surviving lineage of a deceased beneficiary to split up equally the deceased beneficiary’s share. However, if the entire class is gone (all children dead) the grandchildren would split the entire pool of assets equally. Intestacy laws will define the heirs and usually does not fit the client’s estate plan.
Example

Suppose Adam had four children, three of whom are alive and one of whom is deceased but survived by four children at the time of Adam’s death. If distribution is to be made per stirpes, the estate is divided equally into four parts. Each of the three living children receives a one-quarter interest and the four surviving children of the deceased child equally share that deceased child’s one-fourth interest.

On the other hand, if distribution is to be made on a strict per capita basis, each lineal descendant, regardless of the degree of relationship to the decedent, inherits the property. Thus, the estate is divided equally among the three living children and the four children of the deceased child. This results in each of Adam’s children and grandchildren taking one-seventh of the property.

The interpretation of the terms per stirpes and per capita differs under the various state laws. In the absence of a specification in the will, the applicable method is determined by local law. The majority of states adopt per stirpes distribution in the absence of the testator’s clear intent to distribute per capita. To avoid confusion and to guarantee that the intent of the testator is fulfilled, the preferred method is to provide for the desired distribution in the will.

Will Distribution Methods

- per stirpes (by the roots/class)
- per capita (by the heads/persons)
- per capita with representation

Types of Wills

Holographic Wills

holographic will

Slightly more than one-third of the states allow a will that is totally handwritten by the testator to be accepted for probate. This type of will is called a holographic will. It must be signed at the end but need not be witnessed. Some states require that a holographic will be dated by the testator, and at least one state requires that it be found among the valuable papers of the testator to be accepted as a valid will. Interestingly, even if a holographic will is written on numerous pieces of paper, the writings are not required to be fastened together.
Nuncupative Wills

Nuncupative wills are oral wills made by the testator, in the presence of witnesses, during a final illness shortly before death when it is impossible to write a will. Where such wills are permitted, the witnesses must submit an affidavit declaring the testator's final wishes. In other words, the testator's verbal declaration must be reduced to writing within a few days after the oral will is made. Some states allow nuncupative wills. Execution formalities for the written version of the testator's nuncupative will, such as the number of witnesses, are usually the same requirements a state imposes for traditional written wills.

Joint and Mutual Wills

Joint will

Joint wills and mutual wills are sometimes called love wills. Two related persons may decide to execute a single joint will if they have a common scheme for the disposition of their property. Most often, a joint will is written by a husband and a wife. Both parties sign the one document. As a practical matter, joint wills may create a problem upon probate. The original will for both parties is admitted to probate at the death of the first party. Consequently, if the surviving party does not write a later will, it is cumbersome and possibly costly to search for the original will that was filed with the probate court and made part of the probate record of the first decedent. A question may also arise as to whether the living individual is, in some way, contractually bound when the original will is filed because the parties have bound themselves, morally if not legally, to deal with their property according to a prearranged plan. After the death of one of the parties, it is questionable whether the second party is bound to the preexisting plan or is free to change the will. In many situations, the courts have held that a binding contract existed between the parties that become irrevocable upon the death of the first party to a mutual will arrangement.

Joint wills are rarely drafted because most testators want to be able to change their will provisions after one spouse dies. Even if the spousal testators did not intend to create a contractual arrangement when their joint will was executed, a court could interpret this to be an irrevocable agreement on the intent of the spouses at the time of creation.

Mutual will

A joint will should be distinguished from a mutual will, also referred to as a mirror or reciprocal will. Mutual wills exist when two or more parties agree to have their property distributed in a
particular fashion upon their death. They execute separate wills that have reciprocal provisions. Mutual wills could also be signed jointly, which makes them both mutual and joint wills.

Both joint and mutual types of will arrangements are cumbersome. They should not be entered into without objective advice regarding the ramifications. For instance, one consequence of joint and mutual wills is a possible loss of the marital deduction. Many disputes among beneficiaries of contrary wills arise from writing such agreements. An example of an agreement to write a mutual will may be part of a property settlement agreement pursuant to a divorce.

**Example**

Both parties may agree that no one but the offspring of their marriage will inherit any of their property. As part of the agreement, each party executes a reciprocal will leaving all their property to the children born of their marriage. There is some question of whether the parties can legally be contractually bound not to revise or revoke their wills. Such an agreement is contrary to the law of wills and the general principles providing that a will is a unilateral declaration that can be voluntarily altered, amended, or revoked at any time during the testator’s life.

**Amending or Revoking a Will**

**codicil**

Wills are a unilateral declaration of intention and may be amended or revoked at any time. They are legally enforceable only if they meet the qualifications for validity and are still in effect at the time of death. Sometimes a will requires minor changes that may be made by writing a codicil. A codicil is a modification of the will. One or more paragraphs may be revoked or amended, leaving the rest of the will intact. A codicil must be signed with the same requirements and formality as the original will.

A will may be revoked in its entirety in one of several ways. Most commonly, a more recent will is written declaring that all prior wills are revoked. Revocation can also occur by making a codicil that specifically invalidates the will. Not all subsequent wills or codicils have the effect of revoking a former will. To effect total revocation, a new will must state that it is intended to revoke the former document. In the absence of such a declaration, it is a matter for construction and interpretation by the courts as to whether the new will revoke the earlier one or merely modifies it. A modification may be accepted if there is a partial inconsistency. Making a later, valid will that is totally inconsistent with an earlier one can also constitute a revocation of the former will.
Alternatively, a will can be revoked by the maker if he or she intentionally destroys it or mutilates it by tearing. However, inadvertent or unintentional destruction of an original will would not cause a revocation if there is some way of proving its existence and validity. A copy that is certified as the last will is usually accepted as such if it can be shown conclusively that the original was inadvertently destroyed.

In some states, wills may also be totally or partially revoked by an act that causes invalidation under state law. If a divorce occurs that is not contemplated in the will, in some states the entire will is revoked. In other states, only the provisions of the will that pertain to the former spouse are revoked by operation of law.

**Revocation of a Will**

- subsequent will expressly revoking prior wills
- codicil expressly revoking prior wills
- subsequent will totally inconsistent with prior will
- intentional destruction or mutilation of prior will
- certain acts (divorce, marriage, after-born or after-adopted children)

When a testator marries subsequent to the writing of a will, the will may be revoked entirely unless it specifically contemplates the marriage, or the new spouse is entitled to the equivalent of an intestate share. Similarly, after-born or after-adopted children not contemplated in the will may cause the will to be revoked, or these children may be entitled to an intestate share unless the property in question passes to a surviving spouse or the omission of the after-born or after-adopted child is intentional.

Furthermore, a murderer of the testator cannot inherit under the will. States do not allow these individuals to profit from such an act.

**Spouse's Right of Election Against a Will**

**spousal right of election against the will**

The right of election against the will is an election right of a spouse to receive a specific portion or percentage of the decedent-spouse’s estate in spite of the will. A spouse who is legally married to the testator at the time of death cannot be totally disinherited under most state laws. Even though a will can disinherit a spouse totally, the spouse can generally assert a statutory right to claim a certain share of the estate (for example, a surviving spouse may have a right to 30 percent of the estate). In many states, property subject to the **spousal right of election against the will** includes not only property owned by the testator at death, but also certain property that the testator gave away during lifetime—as long as he or she retained the right
to the income or other use of the property until death. In some states, life insurance paid to a named beneficiary avoids the right of election. The exercise of a right of election can also be avoided by a valid, properly drafted antenuptial agreement.

**Contesting a Will**

Disappointed heirs, entirely or partially overlooked in the will, may attempt to have the will set aside through legal channels. After a will is admitted to probate, any interested parties may file an action to contest the will’s validity. An interested party is one who stands to benefit if the will is overturned. There are six grounds on which a will may be contested. One or more of them may be alleged in an attempt to have the will invalidated.

- The first ground is improper execution. In other words, some ingredient essential to the valid execution of a will is missing, such as the fact that the requisite number of witnesses did not sign the declaration.
- It may be claimed that the testator was not legally competent to make a will at the time of execution.
- A third ground commonly alleged is that the testator was under duress or unduly influenced by another to make the will as he or she did. This has sinister implications. The accusation is that the testator was not functioning as a free agent in expressing personal intentions but was following the advice of another party (usually someone with a financial interest in the outcome).
- The fourth ground for contesting a will is fraud. Someone defrauded the decedent into making a particular will by outright lies or otherwise misleading him or her.
- The will is alleged to be a forgery. That means it is not the true will of the testator, and the testator did not sign it.
- A will may be contested on the grounds that the one admitted to probate had been revoked by an act of the testator before death.

*will contest*

Some of the warning signs that indicate an increased likelihood of a *will contest* include the following:

- a will that is created, arranged, and/or paid for by a primary beneficiary
- a will that has bequests that are very different from prior wills
- a will that disinherits one or more natural heirs
- a will disposing of great wealth
• a will created and signed by a testator without the benefit of an attorney
• a will with unusual dispositions
• a will by a physically or mentally weak person
• a will passing significant property to other than lineal heirs who represent the estate

A will may also be wholly or partially revoked by operation of law. In other words, the provisions of the will are not legally enforceable in that the directions or bequests would not be legal if made.

Note that contesting a will is very different from a spouse's election to take against the will. Contesting a will is aimed at destroying the entire will's validity, while the statutory election only gives a spouse a certain share of the estate while leaving the will otherwise intact.

Testamentary Trusts

testamentary trust

A testamentary trust is one created within a will as a part of the will. It becomes both effective and irrevocable at the time of death. Because a testamentary trust is contained in the body of the will, it becomes a matter of public record when the will is probated. Thus, it is open to public scrutiny. By definition, a testamentary trust generally becomes part of the probate estate. The trust is created under the will when the testator uses language indicating an intent to have some of the property held in trust. Frequently, a trust under a will is a contingent trust. An example of such a provision is the testator who bequeaths all the property outright to a surviving spouse. However, in the event that the spouse predeceases the testator, he or she gives the property to the minor children in trust until they reach majority or other suitable age for distribution. The testamentary trust must contain the same elements as a living trust. There must be an intention to create the trust and trust property, as well as a method to determine beneficiaries.

A testamentary trust may be a trust that provides a lifetime income to the surviving spouse with the remainder passing to other beneficiaries at the spouse's death. If a testator creates this type of trust, the trustee manages and invests property to provide income for the income beneficiary (surviving spouse). At the death of the income beneficiary, the trust principal is distributed to the remainderperson in accordance with the terms of the trust. As with living trusts, the trustee holds legal title to the property with the beneficiaries holding equitable title. The testator may direct that principal be distributed either on the happening of an event, such as the death of an income beneficiary, or upon a remainder beneficiary reaching a stated age. A testator may also direct that the remainder beneficiary or beneficiaries receive partial
distributions of principal at specific ages. It is also possible to accumulate income until the beneficiary attains a certain age, at which time it is distributed. The testamentary trust may contain a power-of-appointment provision giving the donee of the power (for example, the surviving spouse) the ability to apportion assets among proposed remainderpersons at some future time when distribution is to be made. This power provides flexibility in making sure that assets are distributed according to need as opposed to a fixed-share division determined when the trust is executed. As long as this power is limited so that the person who holds the power can only appoint to the remainderperson, it does not cause the testamentary trust to be included in the power holder’s estate for estate tax purposes.

Because the testamentary trust is created under a will and becomes part of the probate estate, there are no savings in estate taxes or income taxes during the testator’s lifetime. Moreover, there is no protection from probate costs. A testamentary trust is frequently used when the testator does not wish to part with property during lifetime but recognizes the need for a disposition in trust for the benefit of one or more family members after his or her death. While there is no estate tax saving in the testator’s estate, by creating a life estate for the first generation of beneficiaries, the property can be available to provide income and possible distributions of principal as needs arise during the beneficiaries’ lives without passing through their estates at their death. Testamentary trusts can have built-in flexibility with discretion in the trustee to sprinkle income and possibly principal among various beneficiaries in different income and estate tax brackets whose needs may differ.

Tax savings may also be accomplished with the establishment of separate trusts. Trusts can be divided into separate shares when the youngest or oldest remainder beneficiary attains a specific age, thereby creating additional tax paying entities. The trustee may also be given discretionary powers to accumulate or pay out income, again taking into consideration the relative tax brackets of the beneficiaries and trusts as well as their income needs in any taxable year. Furthermore, the trustee may be given authority to purchase life insurance on the life of a life income beneficiary that provides security for that beneficiary’s family at the beneficiary’s death. For example, a life income beneficiary who receives $50,000 of income per year from a trust is a good illustration. At that individual’s death, a substantial change in his or her family’s living conditions may result when the income from the trust ends. The life insurance proceeds can be used to replace that income. Payment of life insurance premiums on the life of a beneficiary is not taxable income to the beneficiary. Compared with the beneficiary’s purchasing his or her own life insurance with after-tax dollars, more tax savings can result if the trust is in a lower income tax bracket than the beneficiary.

To summarize, a testamentary trust functions similarly to any other kind of trust after the testator’s death. Because it is part of a will, the testamentary trust is revocable until death, at which time it becomes irrevocable. The trust can provide security and professional management for
beneficiaries after the testator is gone. It also gives the testator some control even after death with regard to the intermediate and final distribution of property. While no estate taxes are saved at the testator’s death, the trust may provide for life income beneficiaries so that assets escape taxation at the death of the income beneficiaries. Because the trust is irrevocable once it is operative, it can provide tax savings through income splitting and accumulation of income.

The testator may provide for any one or more of a variety of methods for the distribution of principal from a testamentary trust. For instance, the trust terms may provide that the principal is to be distributed at the discretion of the trust beneficiary. The discretion amounts to giving the trust beneficiary complete control over the trust principal. Another possibility is to provide for trust principal to be distributed at the sole discretion of the trustee. This arrangement gives the beneficiary no control over when principal may be received. A variation of this arrangement is to provide that trust principal be distributed at the discretion of a designated third party, other than the trustee or the trust beneficiary. Under either of these last two methods, trust principal can be distributed at any time but requires the approval of someone other than the trust beneficiary. The testator may specify when trust principal is to be distributed. For example, the trust may provide that determined percentages of trust principal are to be distributed as one or more beneficiaries attain a specific age. Alternatively, there may be directions for a certain percentage of trust principal to be distributed each year or every second, third, or fourth year. A third possibility is to provide for no distributions of trust principal until termination of the trust itself. Here, postponement of distribution of trust principal is limited only by the rule against perpetuities. There are numerous choices available to the testator other than those previously mentioned. Generally, a testator has complete flexibility to determine the method of the distribution of trust principal, subject only to limitations on accumulations for an unreasonably long period of time.

Pour-Over Trusts

Pour-over trusts simply mean that property is transferred or poured over from an estate or trust into a preexisting estate or trust. It may occur in one of several ways. An individual may create a living trust executed prior to a will that provides that, at the individual’s death, the residue of his or her estate is payable to a preexisting trust to be administered with the other trust assets. Pour overs can also take place the opposite way. A preexisting living trust may be poured into the estate and administered and distributed under the terms of the will as part of the residuary estate. By either means, the pour-over device can be used to consolidate the grantor’s assets, thereby simplifying administration. Another benefit is that administrative costs are reduced.
If the pouring over is from a will into a living trust, a legal question arises concerning the pre-existence of the trust. For example, a will cannot be made stating that assets are to be poured over into a trust that is not executed until the following year because the named trust was not in existence at the time the will was written. To have legal effect, pouring over must be done into existing instruments. Therefore, the trust must be executed prior to a will if that is the type of pour-over arrangement in question. Also, a question arises if the preexisting trust is amended or terminated after the will is executed. Because the amendment was not within the contemplation of the testator when the testator’s will was written, does the pour-over device also refer to the amendment to the trust agreement? This problem has been resolved by statute in many states by authorizing the pouring over into an amended trust agreement, if the original trust agreement was in existence at the time the will was executed. The financial services professional should consult the statutes of the jurisdiction(s) in which a client resides to determine whether an amended trust will have validity for pouring over under a preexisting will. Otherwise, a new will should be drafted after the amendments to the trust are made. There is an act called the Uniform Testamentary Additions to Trust Act that has been adopted by a number of states. In those states that have adopted the act, amendments to a living trust enacted subsequent to the execution of a will from which assets will pour over to the trust are deemed valid.

Transfers by Contract

Property may also be transferred at death by contract. The most usual situation involves life insurance contracts. In addition, antenuptial and postnuptial agreements are becoming more common.

Life Insurance and Other Contracts

Life insurance proceeds payable to a named beneficiary pass outside the will to the beneficiary, be it an individual or a trust. Policy proceeds are always distributed according to the beneficiary designation on the policy. Directions for distribution in the will have no effect, unless no designated beneficiary is named or the policy is made payable to the estate. Likewise, death benefits from retirement plans pass to named beneficiaries outside the will unless they are made payable to the estate or the executor in his or her capacity as personal representative of the estate.
Antenuptial and Postnuptial Agreements

antenuptial (prenuptial) agreement

It is not uncommon today for persons to make prenuptial or antenuptial agreements with their intended spouse. An antenuptial (prenuptial) agreement (the terms “antenuptial” and “prenuptial” are synonymous) is a legally binding agreement between two parties in anticipation of marriage. The agreement provides for limitations on transfers of property between them in relinquishment of their marital rights to each other's property. These agreements can be very useful when it is not a first marriage for one or both spouses. Either spouse may wish to protect property accumulated before the present marriage for children of a prior marriage. An alternate way of preserving property for children is through the use of trusts. However, antenuptial agreements may serve a variety of purposes. The agreement may provide for certain transfers from one party to the other before the marriage as an inducement to enter the legal relationship. Antenuptial agreements may also substitute for statutory elections and other inheritance rights of a spouse at death. The agreement may provide that when one spouse dies, the other spouse will receive a fixed sum in full satisfaction of his or her rights to share in the deceased spouse's estate. The spouse who accepts the terms of an antenuptial agreement will receive that property on the death of the decedent in lieu of a statutory share that is the right of a surviving spouse. As stated earlier, the antenuptial agreement has the full force and effect of an arm's-length contract. Unless duress, fraud, and similar wrongs were involved, false information was supplied, or information was hidden regarding the extent of assets and size of the estate of either party when the agreement was reached, a court of law generally upholds its terms. Aside from trusts, antenuptial agreements can provide full protection of one's estate for one's intended beneficiaries.

Postnuptial agreements may be entered into between spouses in settlement of marital rights and property usually pursuant to a divorce. Typically, in such an agreement, each spouse gives up all rights in the other spouse's estate. These agreements may or may not provide for post-death support benefits. To the extent that payments cease upon the death of either spouse, the other spouse gives up all rights as a creditor of the estate. However, if the benefits of a post-nuptial or property settlement agreement survive death, the other party has rights against the decedent's estate as a creditor.

Transfers at Death by Contract

- life insurance proceeds
- retirement plan death benefits
- antenuptial and postnuptial agreements
Transfers by Operation of Law

**Operation of Law**

Property not passing by will or contract may pass by what is called *operation of law*. An example of property passing by operation of law is the transfer of jointly held property to the surviving joint tenant. In addition, certain property may pass to survivors under laws pertaining to family allowances and homestead allowances. Another type of transfer in this category is intestate succession.

**Transfers of Property at Death**
- by will
- by contract
- by operation of law

Joint Tenants with Right of Survivorship

Property held jointly with right of survivorship (including tenancies by the entirety) automatically passes to the surviving joint tenant. In addition, a bank account held in trust for a named individual passes automatically to the beneficiary. This type of account is called a Totten trust or a pay-on-death account. The term is somewhat of a misnomer because it is not a legal trust. Totten trusts and pay-on-death accounts are payable-on-death arrangements. The decedent retains the right to control the assets in the account until death, at which time it passes automatically to the named beneficiary outside the will. The survivorship form of ownership takes precedence over provisions in a will.

Family Allowance

**Family Allowance**

One of the first distributions from a decedent’s estate permitted by all states is called a *family allowance*. It is a small, specified amount set aside for the interim support of a surviving spouse and minor children during the period of estate administration. This special allowance provides the surviving family members with immediate funds, consequently avoiding the delay usually associated with distributions from a decedent’s estate until after all debts have been paid. The amount of the allowance varies by state and by the size of the decedent’s estate and family needs. It is property the family may keep. It is not considered part of the distributable estate and is usually exempt from state death taxation. The funds are paid to the family despite unsecured creditor and tax claims.
Homestead Allowance

**homestead**

Another amount set aside in most states is the homestead allowance or rights. Basically the homestead allowance is an exemption that keeps a specified amount of real property and, in some states, personal property of the decedent out of the reach of unsecured creditors. Its fundamental purpose is to keep the family from being dispossessed of its home and being impoverished as a result of the decedent spouse's death. It prevails over a disposition of the family home under the decedent's will. The so-called homestead pertains to the home the family lives in and the property surrounding the home, subject to acreage limitations that vary greatly by state. In addition to a homestead allowance consisting of real and sometimes personal property, many states also grant monetary homestead allowance amounts to the surviving spouse and to minor children.

Intestacy

All property not passing by contract, will, or operation of law passes under the laws of intestate succession (called laws of descent and distribution in some states). Intestate means “without making a will.” A person who dies without a will or with a will that has been revoked, annulled, or in some other way declared invalid is said to die intestate. A decedent can also die partially intestate. Partial intestacy occurs when a testator has a valid will but the document does not dispose of all of the testator's property. There are intestate laws of each jurisdiction that prescribe the way an intestate’s (the word as used frequently signifies the decedent) property is to be distributed. The law of the state where the person is domiciled controls the distribution of all the person's property located within the state. The intestate distribution of the decedent’s real property, or tangible personal property, located outside of the state of domicile, is determined by the laws of the state where the property is located.

No distinction is usually made between real and personal property with respect to distribution under the laws of intestate descent. To provide for all property not otherwise transferred, each state has established laws of intestate succession. There is a prescribed order for disposition to the heirs of the deceased person. Intestate succession refers to the specified order of distribution by the state of the property of persons who die without leaving a valid will.

**Example**

Henry dies, leaving $900,000 worth of property. He does not have a will; $300,000 passes to Henry’s wife. The remaining $600,000 is divided equally among his three adult
children despite the fact that he was very close to his sister and planned to leave her a significant amount of assets at his death.

There are variations among the states with respect to the descent and distribution of an intestate's property. Usually, the person given primary consideration is the surviving spouse. That is not to say that the surviving spouse takes all. Generally, a surviving spouse receives from one-third to one-half of the decedent's estate if there are living children or parents of the decedent. One scheme of intestate succession provides that a share first be set aside for the surviving spouse. An example is a provision for the first (some stated amount) dollars plus half of the estate to go to the surviving spouse. The remaining half is then divided equally among all children of the decedent. If there is no surviving spouse, surviving children may inherit the entire estate in equal shares. Next in line of lineal heirs are parents of the decedent. If a spouse survives but there are no children, the parents generally share the probate estate with the surviving spouse. Brothers and sisters usually come next in line, and so on. The order is a rigid one.

State intestacy statutes do not provide for inheritances for friends, business associates, or charities. Nor do they always make adequate provision for surviving spouses. Relatives of an individual who died intestate are frequently shocked, angered, and financially hurt by the controls put on the decedent's assets by the court. No amount of persuasion can alter the statutory scheme or convince the court that the decedent intended the property to pass to other persons.

escheats

If there are no living relatives, the property escheats to the state. Escheat means that property reverts to the state for lack of any individual competent to inherit the property. In other words, there are no heirs or next of kin to whom the property can pass by way of intestate succession. The state is the ultimate owner and taker of the estate and usually designates some state institution to receive the property.

Transfers at Death by Operation of Law
- joint tenants with right of survivorship
- family allowance
- homestead allowance
- intestacy
READING 1B: THE DURABLE POWER OF ATTORNEY: AN ESSENTIAL FINANCIAL AND ESTATE PLANNING TOOL

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Estate planners warn their clients about the risks of dying without a will. Failing to plan for future incapacity could also result in irreparable harm to an individual and his or her family. Furthermore, the likelihood of a long-term disability is much greater than that of death during much of a person’s lifetime. The risk of serious incapacity increases with age, and the demographic trends indicate that the segment of the population over age 65 is growing much faster than the rest of the population. This problem and the uncertainty about the future of the federal estate tax, state estate or inheritance taxes and other estate-settlement costs indicate that estate and financial plans should be flexible for changing needs. The power of attorney is an inexpensive device that permits a person to designate a family member or professional adviser to make critical financial and personal decisions and take action to preserve the estate when incapacity occurs.

What is Power of Attorney?

A power of attorney is a document in which the client (the principal) authorizes an agent (also known as an attorney-in-fact) to act in his or her behalf. The power may be quite limited: for example, permitting the agent only to make deposits to the principal’s bank account or sign an agreement of sale for real estate. Or the power can be broad, authorizing the agent to engage in nearly any transaction that the principal could.

A power of attorney is also limited in its duration. It can be expressly limited in time. For example, the agent may be given a power of attorney that terminates when a specific act is completed. Even if no duration is specified, a conventional or common-law power of attorney becomes inoperative upon the incapacity of the principal. To extend the power beyond the incapacity of the principal, the power must be made expressly durable.

A durable power of attorney takes effect immediately when the document is executed even though it may not be needed until much later, if ever. Some individuals, however, are reluctant to grant an agent broad powers to act at a time when the principal is capable of acting. These people would prefer to use a “springing” durable power of attorney. Recognized in many states, a springing power lies dormant and ineffective until a designated time, such as the principal’s incapacity. The main drawback of the spring power is that it may be a long time before it becomes effective and there may be difficulty in getting third parties to act in compliance.
When Should a Durable Power Be Used?

A durable power of attorney should be used whenever an individual feels he or she will need someone to make important financial and/or personal decisions after the individual loses capacity. Most individuals will have assets or personal affairs that must be managed should they lose capacity. Without a power of attorney, a guardian of the principal’s property would have to get court approval of basic steps in the estate planning process. If the individual has a complex estate plan, the durable power is essential. A wealthy individual who has begun his or her estate plan by making lifetime gifts or charitable donations will need someone to have the power to continue making such gifts or donations after the donor loses capacity. It would often be devastating to the individual’s estate plan if the gifts could no longer be made. The durable power of attorney provides a mechanism for making the necessary to continue or alter an estate plan without court approval for a legally disabled principal.

One example of the need to act for a disabled principal is the irrevocable life insurance trust (ILIT). Suppose the individual makes regular contributions to an irrevocable life insurance trust. A durable power must be in effect for the premiums to be paid from the principal’s funds after the principal loses capacity. Otherwise, the principal’s family might have to pay the premiums from their own funds for the rest of the principal’s life. This, of course, would be counterproductive to the principal’s estate plan. Or, suppose the principal has a living trust with terms that have become inappropriate due to the current status of the federal estate tax law. The attorney-in-fact can be empowered to revoke or amend the trust as necessary.

All states authorize the health care power of attorney. This durable power permits the agent to make health care decisions for the principal if the principal loses capacity. Many individuals prefer the health care power of attorney to a living will; some use the health care power in conjunction with a living will.

What Can a Durable Power Accomplish?

One of the primary uses of a durable power is the delegation to an agent of the management and control of the principal’s financial affairs during his or her incapacity. The following is a sample of the types of property management powers that might be considered for a power of attorney:

- to make deposits and withdrawals from bank accounts
- to sign tax returns and appoint an agent to represent the principal with the IRS
- to make investment decisions
- to deal with retirement plans, including IRAs
• to have access to the principal’s safe-deposit box
• to create a living trust or fund a previously created living trust
• to revoke or amend a living trust or to direct the trustee to make distributions
• to revoke or change beneficiary designations
• to forgive or collect the principal’s debts
• to enter into contracts on behalf of the principal
• to make gifts on behalf of the principal
• to disclaim gifts or bequests made to the principal
• to deal with life insurance on the life of the principal

**Why Must the Durable Power BeDrafted Carefully?**

An individual might be tempted to avoid attorney’s fees by purchasing a durable power document form from a business supply store or using consumer-oriented computer software to draft the power. However, a power of attorney is useful only if it works as intended. The likelihood of success is far greater if the appropriate professional advice is sought.

Because the possibility of abuse exists when the agent is managing the principal’s financial assets, financial intermediaries such as banks, stock brokers, and insurers are often hesitant about complying with broad powers granted to an agent. State law often construes the power very narrowly to prevent the abuse of the power. If court intervention is required, it will be costly and will perhaps further limit the flexibility of the agent to use the durable power since the courts are likely to construe the power narrowly. Drafting the document so that the powers granted the agent are very specific is helpful in persuading third parties to enter into transactions with the agent. The more specific the language, the more likely it is that third parties will honor the power because the intent of the principal is expressly stated in the document.

Another important point is the effectiveness of the exercise of a power of attorney for tax purposes. The IRS has successfully challenged and denied the annual gift tax exclusion for gifts made under broad-form powers of attorney in which the agent was not expressly empowered to make the gifts. A similar result should occur if the agent attempts to disclaim property inherited by the principal. The IRS may treat the disclaimer as invalid for tax purposes. A power of attorney granted without these express powers would render these estate planning techniques ineffective and increase the amount of estate taxes the principal’s family will have to pay.
READING 1C: COMMUNITY PROPERTY

Historical Origins

The community-property system currently in use in nine states is based on Spanish and French civil law pertaining to marital property rights. Brought to America by Spanish and French colonists, the ancient concept was grounded in a precept of equality. Because a marriage is a community consisting of two marital partners who, through their joint labors, industry, and efforts, contribute to the prosperity of the marriage, both spouses possess an equal right to the property and its benefits.

The planner must be aware that, while the community-property states share some common features and definitions, there is no one uniform community-property system. Although the fundamental aspects of community-property law are similar in the different states, many differences have evolved because of refinements by state legislatures. The estate planner should guard against the expectation that specific aspects of one community-property state carry over to another community-system state.

Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are the traditional eight community-property states. Wisconsin is recognized as the ninth community-property state since its version of the Uniform Marital Property Act (UMPA), incorporating many community-property concepts, became effective in January 1986. Instead of the term community property, Wisconsin uses the term marital property. While Louisiana still closely follows the civil law, the other states have adopted some traditional American common-law principles to meet changes in societal and economic needs. In addition to the above-mentioned nine community-property states, Alaska allows a statutory election for certain property to be treated as community property. In other words, Alaska has statutory provisions allowing Alaskan residents to elect community property status to the extent provided in a community property agreement or a community property trust. In 1998, Alaska passed a statute permitting nonresidents of Alaska to transfer property into a trust, referred to as a community-property trust. If the trust has one or more Alaskan trustees, any portion or all of the trust property is treated for tax purposes as community property. Generally, these trusts are created so that some or all of the trust property receives a step-up in basis (discussed in a later chapter) at the death of the first spouse.
Nature of Community Property

In community property states, property interests acquired during marriage are presumed to be owned equally by spouses. The community property principle recognizes the existence of community ownership of property by husband and wife. In essence each spouse is deemed to own a one-half interest in property acquired during the marriage regardless of which spouse actually acquired, earned, gained, or is otherwise responsible for ownership of the property. This is not to say that all property belonging to a married couple is necessarily community property. A husband and wife can own property separately in their own individual rights. For instance, property owned by either spouse prior to the marriage continues to be the spouse's separately owned property during the marriage (unless affirmative steps are taken by the owner spouse to change the ownership status of the separate property). Property inherited by or gifted to an individual spouse during marriage also retains separate property characterization. Wisconsin uses the terminology of the UMPA and refers to separate property as individual property. For purposes of this chapter, the general terms community property and separate property are used.

Presumptions as to Marital Property

Generally speaking, the underlying community-property presumption is that property owned by a husband and a wife belongs to both of them in equal shares, except for that property that

can be proven to belong to a spouse separately. Concerning certain issues such as termination of a marriage by death or divorce, the rights of creditors, tort liability, and tax treatment, the community-property system generally presumes that all property owned during a marriage is community property. This presumption is not conclusive, however, if the separate status of property can be proven or if there are other relevant facts that rebut the presumption. In other words, the separate property of a spouse must be specifically designated as separate property to retain its noncommunity character. The fact that property is titled in an individual spouse’s name or was acquired with one spouse’s separate funds may not in itself be sufficient evidence to rebut the community presumption. The facts and circumstances surrounding the use of the property and the conduct of the parties toward the property may be more evidentiary than the title or the source of funds for its initial purchase. Common-law states (that is, non-community-property states) rely directly on deeds and certificates of title to determine ownership.

**transmutation**

In addition, practically all the community-property states grant spouses the power to determine or change the character of their property as community or separate. For instance, Texas previously only allowed community property to be transmuted to separate property. Currently, Texas law permits separate property to be transmuted to community property. Therefore, spouses may change community property to separate property and vice versa. Changing the source or nature of property in community-property states by transmutation is often done for the purpose of achieving tax savings. The legal term for voluntarily changing the nature of property is transmutation (in Wisconsin, classification or reclassification). Depending on the type of property and particular circumstances, transmutation may result from contract (bilaterally) or gifts (unilaterally). There are two important transmutation restrictions, however. First, federal law obligations cannot be circumvented by transmuting property; and, second, a transmutation that is effective between spouses may not be effective against third parties like creditors.

The best way to overcome the general presumption favoring community property is for married partners who reside in or move in and out of community-property states to keep complete, organized, and accurate records of their personal financial matters. Another way to secure property ownership is for couples to file an inventory of assets at the time of marriage to serve as an official record of separate identity. Note that in some community-property states, especially California, the general presumption is less difficult to rebut when the marriage is of relatively short duration. In some states it is possible for individuals to waive their rights in community property in a prenuptial agreement. Although the general community presumption in

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and of itself is quite straightforward, different circumstances readily lend themselves to more involved issues.

**Example**

Mary and Anthony became engaged and planned to marry the following spring. They made purchases for their new home and their future together. Although Mary wanted to furnish their home with antiques, Anthony felt that antiques were too expensive and impractical. Before the wedding Mary, the wealthier of the two, decided to purchase the antiques with her own separate funds, and she arranged for delivery to take place after the wedding. In this case, arguments could be made both that the furniture is separate property and that it is community property. Was the furniture acquired before or after the marriage? Although in this scenario the presumption of community property could easily be rebutted, Mary may have intended the property to be community marital property. If the antiques were partially paid for with Mary’s separate funds prior to the marriage and the balance paid with community funds after the wedding, are the antiques still Mary’s separate property? If the antiques appreciate in value and are later sold at a gain, are the profits community property or separate property?

**Separate Property**

- property acquired prior to marriage
- property acquired by gift
- property acquired by inheritance, bequest, devise
- property acquired in a court award
- property transmuted into separate property

While earnings from the labor of a husband and a wife are nearly always community property, community-property states are almost evenly divided in how they treat “rents, issues, or profits” of separate property realized during marriage. Idaho, Louisiana, Texas, and Wisconsin generally treat the rents, issues, and profits generated by separate property acquired during a marriage as community property but hold that natural increases in the size or value, that is, appreciation, of separate property due to market changes and inflation continue to be separate property. Therefore, if the separate property of community spouses is sold, the gain on the sale continues to be separate property. If the gain is used to acquire other property, the newly acquired property is separate property. In the remaining states, rents, issues, and profits of separate property retain a separate-property identity, but increases in value resulting from community labor and effort belong to the community. In all community-property jurisdictions, however, income and earnings generated by separate property prior to marriage remain separate, and income and earnings produced by community property constitute community property. It is not difficult to imagine the problems that can arise with regard to the benefits flowing from community
property. The spouse claiming the separate nature of property has the burden to overcome the community presumption with adequate proof. Evidence of separate ownership is difficult to provide if adequate records are not kept, particularly when there has been commingling of separate and community funds and other assets over the years. Tracing the property’s separate identity may be virtually impossible in such cases.

**Joint Tenancy**

Property may be held concurrently by two or more individuals with a right of survivorship. The concept of joint tenancy with right of survivorship is embraced by all common-law states. At the time of one spouse’s death, the jointly held property passes automatically, by operation of law, to the surviving spouse. Administrative delay is avoided and, because the property does not go through the probate process, probate costs are reduced. The majority of married partners in common-law states own their family residences as joint tenants with right of survivorship or, similarly, as tenants by the entireties.

None of the community-property states recognize the tenancy-by-the-entireties form of ownership, and joint tenancy with right of survivorship is restricted. Some community-property states, however, statutorily create a right of survivorship in the family homestead so that a surviving spouse is not left homeless.

Generally, a survivorship component is not present with community property. This is not to say that married couples in community states cannot hold property as joint tenants with right of survivorship. About half the states permit a survivorship provision with community ownership of property. Some community-property states—Arizona, Idaho, Nevada, and Washington, for instance,—have laws permitting residents to own property titled as community property with right of survivorship. In these states, this form of titling overrides a community spouse's disposition of the particular property by will. The property, because it passes by operation of law, is not subject to probate. Generally, community property is probate property except in some community states. In these states, if the decedent-spouse’s community share passes to the surviving spouse, it does not pass through probate. In other community states, it is strictly an either-or ownership; couples have the choice of owning property in the community sense, jointly with right of survivorship, or as tenants in common.

Married partners who have acquired property during marriage in a community state and do not want it to be community property have to take affirmative steps to override the community identity with their chosen form of ownership. In most of the community states it is the form of property expressed in the title document that controls. If one of the spouses claims that ownership is other than what is stated in the deed, bank account, certificate, or title, that individual has the burden of proving the alleged form of ownership. For joint ownership to supersede
the community presumption, a number of the states require an express reference in the title that the particular property is held as joint tenants with right of survivorship. When community property is titled or retitled in joint tenancy with right of survivorship, a transmutation of the community property into separate property results.

Classification Rules

time of acquisition rule

inception-of-title rule

The general classification rule is known as the time of acquisition rule or the inception-of-title rule. This rule provides that the character of an asset, separate or community, is established at the time the asset is acquired, and once established, the character is not altered by later events. So, if prior to a marriage one of the parties acquires property, it is and remains the acquiring spouse's separate property. If during the marriage the property is improved using community funds, the property is still the acquiring spouse's asset, but the nonacquiring spouse may have a right to reimbursement for one-half of the community funds spent on the improvements.

Example 1

At the time of H and W's marriage, H owned several acres of unimproved land valued at $15,000. Using community funds, H and W built a home for $175,000 and later improved the residence by adding several bedrooms, bathrooms, and an in-ground pool with bathhouse for $50,000. The value of the home is $350,000 at the time H and W divorce. Although the land remains H's separate property, W has a community claim for reimbursement of her half of the community funds expended to improve H's separate property. In the alternative, H has a claim for the value of the land.

Example 2

Using the facts of the previous example, assume the $50,000 of home improvements came from W's separate funds, which W inherited at her uncle's death. W has to affirmatively prove that the $50,000 was her separate property in order to overcome the community presumption.

A claim to reimbursement, however, may fail when there is evidence of one spouse's intention to make a gift of a community interest to improve the other spouse's separate property.

To establish that property acquired during a marriage is one spouse's separate property, the claiming spouse may show that the asset was acquired in one of the following ways:
• by gift or inheritance
• by purchase with separate property or by separate credit
• by recovery for personal injuries

In keeping with the lack of uniformity among the community-property states, states vary in applying the time-of-acquisition rule. For instance, Louisiana law provides that the character of personal property is established when title passes but that the title for real estate is determined at the time the property is actually conveyed.

Property Character

The character of property is determined by the character of the property used to acquire it initially. For instance, if solely separate property is used to acquire other property during marriage, the newly acquired property is also separate property, and when entirely community property is exchanged for other property, the new property retains a community character (absent an agreement of the spouses to treat the property otherwise).

Example

John spends his separate funds to make a down payment on a cottage in the mountains to be used as a family vacation home. It is titled in the names of both John and his wife, Jane, since the intention is for the cottage to be community property. It is likely the cottage will be characterized as a community asset, based on the parties’ intent.

Commingling

Although the rule that property has the same character of the property with which it was acquired seems straightforward, it is not that simple. The characterization of property may become very complex when there has been a commingling of marital property. Commingling occurs when properties of different characters are mixed, blended, and jumbled up. In these situations, the community presumption typically prevails over the parties’ conflicting claims. Even if the character of the property can be traced, other issues may arise: Do the spouses share the commingled property in percentages proportionate to their separate contributions, or is the commingled property the separate property of one spouse with the other spouse then having the legal right of a creditor for reimbursement of contributions made? Furthermore, some states restrict tracing in certain circumstances.

Example

Shortly after their marriage, Dave and Betsy open bank accounts in both their names. Each places separate funds in the accounts and over time makes additional deposits using community funds. In the course of the marriage there are withdrawals, purchases,
sales, and exchanges of assets with commingled bank funds. If Dave and Betsy should later decide to divorce, they are likely to disagree as to what constitutes community and separate property.

Commingling

Life Insurance. The principles governing the classification of life insurance policies are somewhat different in the community-property states. The treatment of life insurance is an important consideration for estate planners and policy owners because of the impact it may have on a decedent’s estate taxes and because it is an asset that is often overlooked by a migrating couple. Fortunately, all of the information needed to classify an insurance policy is written in the policy. To determine and separate policy-ownership interests in community-property states, three basic doctrines are used.

The proration or apportionment doctrine concept is favored in California and Washington to establish policy ownership interests. This method views the separate and community components of policy proceeds proportionately to the separate and community funds applied to the premiums paid. In other words, the proration theory looks to the source of the payment of the policy premiums.3

The inception-of-the-title doctrine has been adopted in Texas, Louisiana, and New Mexico in many life insurance cases. This approach looks to the character of the funds used to purchase the policy, whether the purchase occurs before or after the marriage. The original funds used to purchase the policy establish its character. If community funds are used for other premium payments, the surviving spouse has a right to reimbursement for his or her share of community funds used for the payments but does not share in the growth in the policy’s value.

The third doctrine classifies life insurance ownership according to the nature of the funds used for the final or last premium payment and has been relied upon in Arizona and Idaho in some group life insurance cases.4 This approach views all but the final payment as voluntary installment payments and the final premium payment as completing the purchase of the policy. Whole life insurance cases, at least in Arizona, follow a reimbursement theory.5

Simply stated, each of the doctrines described above seeks to trace the source of the money applied to the premium payments to determine the character of the policy and the proceeds, and each approach may give rise to some inequities.

Business. If a business is started during the marriage with community property and labor, allocation disputes upon termination of the community are normally easier to resolve than if a premarital business is started with separate property and increases in value after marriage are due at least partially to community capital and labor. An increase in business value during marriage because of improved market conditions does not in and of itself change the original separate character of the business.

Example

Prior to marriage Martha started an interior decorating business. The business owned realty valued at $75,000 at the time of Martha's marriage. At the time of Martha's divorce, which occurred 8 years later, the realty had increased in value to $130,000, due solely to favorable market conditions. The $55,000 increase in value is Martha's separate property.

However, when income is generated by separate property acquired during marriage, approximately half the states consider that the rents, issues, and profits belong to the community, while the remaining states hold that these retain their separate character. Increases in business value attributable to the labor efforts of either or both spouses are frequently held to belong to the community. The issue of labor contributions may be at least somewhat resolved if one or both spouses withdraw a salary from the business. On the whole, the courts appear to be more restrictive in applying commingling concepts to businesses than to bank accounts.

Debts, Obligations, and Liabilities. Although it may seem logical to assume that community principles apply similarly to assets and liabilities, this is not the case. The states are in much greater accord in the treatment of community assets than of community liabilities. The widest differences among the nine sets of community-property statutes and case law occur in the treatment of liabilities. (The term liabilities is typically used in a broad sense to encompass debts, expenses, and obligations.)

There are some areas of relative agreement: (1) a spouse's separate property is usually subject to the claims of the spouse's creditors for the spouse's separate debts; (2) generally, one spouse's separate property cannot be reached by the creditors of the other spouse's separately created debts; and (3) the separate property of both spouses may be available if both partners contracted for the liability.

Differences are more likely to arise when creditors of separately created debt seek to collect from community assets or from one spouse's half of community assets, or regarding the following questions:

- the degree to which community assets are available to satisfy premarital debt
• the order in which assets become available to satisfy liabilities
• the exclusion of specific community assets from the claims of creditors
• the availability of community and/or separate property for liabilities created by one spouse for the benefit of the community
• the use of community property of a later marriage to satisfy alimony and support obligations generated by a spouse's previous marriage and children
• the use of community assets to satisfy one spouse's tort claims

Complexities, problems, and inconsistencies involving community liabilities abound.

**Community Property and Transfer Taxes**

Federal estate tax law requires a decedent's gross estate to include the value of all property in which the decedent had an interest at the date of death. Property rights, however, are determined under state law. In certain situations this means that federal estate and gift tax provisions are applied to a decedent's property in accordance with state property law provisions. Although it is not explicitly stated in the Internal Revenue Code, case law has traditionally recognized that a decedent-spouse's gross estate includes only the decedent's half interest in community property, even if the community property is titled solely in the decedent's name. On the other hand, in a common-law state, if all the marital property were titled in the decedent-spouse's name alone, the spouse's gross estate would include the value of the entire property. Basically, common law property is directed by who owns or has title to the property. If, however, spouses in a common-law state hold property titled as joint tenants or as tenants by the entireties, only half the property value is included in the decedent-spouse's gross estate.

**Example**

Harvey and Joan, a married couple, have always lived in a community-property state. At the time of Harvey's recent death, they owned $12,800,000 of community property, all of which was titled solely in Harvey's name. Harvey's adjusted gross estate will include $6,400,000 of community assets. However, if Harvey and Joan lived in a common-law state, the full $12,800,000 would be included in Harvey's adjusted gross estate.

Thus, a decedent-spouse in a community-property state will, in many instances, have a smaller gross estate than the same decedent-spouse in a non-community-property jurisdiction. Of course, after the Economic Recovery Tax Act (ERTA) of 2001 and the unlimited marital gift
and estate tax deduction became effective in 1982, the transfer tax discrepancies for spouses between community and common-law states became moot.

**Example 1**

Harvey and Joan have always lived in a community-property state. Harvey dies owning $12,800,000 of community property.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harvey’s adjusted gross estate</td>
<td>$6,400,000</td>
</tr>
<tr>
<td>Allowable marital deduction</td>
<td>(6,400,000)</td>
</tr>
<tr>
<td>Harvey’s taxable estate</td>
<td>0</td>
</tr>
</tbody>
</table>

**Example 2**

Harvey and Joan have lived all of their lives in a common-law state. Harvey dies owning $12,800,000 of noncommunity property.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harvey’s adjusted gross estate</td>
<td>$12,800,000</td>
</tr>
<tr>
<td>Allowable marital deduction</td>
<td>(12,800,000)</td>
</tr>
<tr>
<td>Harvey’s taxable estate</td>
<td>0</td>
</tr>
</tbody>
</table>

**Example 3**

Harvey and Joan have lived all of their lives in a community-property state. Harvey dies when there is $12,800,000 of community property. Harvey leaves his community-property share to his son.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harvey’s adjusted gross estate</td>
<td>$6,400,000</td>
</tr>
<tr>
<td>Allowable marital deduction</td>
<td>0</td>
</tr>
<tr>
<td>Harvey’s taxable estate</td>
<td>$6,400,000</td>
</tr>
</tbody>
</table>

Although the unlimited marital estate and gift tax deduction serves to equalize the transfer tax results between community- and noncommunity-property states when the surviving spouse is the beneficiary of the decedent spouse’s estate (as in the preceding examples), if someone other than the surviving spouse receives the decedent’s property, transfer tax differences between community and noncommunity jurisdictions are more likely.

**Clients on the Move**

Mobility is a common aspect of modern life in the United States. Whether for employment or for personal or other reasons, a significant number of Americans move from one state to another each year. Unfortunately, mobility is often overlooked by planners. Clearly, changing domicile between common-law and community-property states and even between community states can pose some complicated estate planning problems. Often questions are not raised about the legal implications of family moves until there is a death or divorce. Once a
marriage dissolves, a determination of the parties’ individual legal rights regarding their assets may be formidable or, worse, impossible unless adequate records have been kept over the years.

Moving from a community-property state to a common-law state does not change the character of marital property acquired in the community jurisdiction unless the parties take steps to expressly change the property to a character other than its community identity. The Uniform Disposition of Community Property Rights at Death Act has been enacted by many common-law states. This act provides for the recognition of community property as retaining its community-property identity at death when spouses move from a community-property state to a common-law state and when community-property funds are used for the purchase of real property in a common-law state.7 As is the case with many uniform acts, however, the Uniform Disposition of Community Property Rights at Death Act has not been enacted by the adopting states uniformly. Therefore, the act varies within the adopting jurisdictions. Estate planners of migrant couples also need to be aware of the likelihood that judges and lawyers practicing in one system are probably not familiar with the legal issues of the other system.

Clearly, addressing all the legalities of the community-property systems is beyond the scope of this chapter. However, regardless of the state in which an estate planner practices or a married couple presently resides, a planner should understand that there are two different legal systems affecting marital property. The planner must be aware of the many implications of client mobility and must recognize that wills, trusts, disclaimers, antenuptial agreements, buy-sell plans, and so forth, that are drafted in one jurisdiction have to be reviewed to make sure they are effective in the current jurisdiction.