

Gerry W. Beyer
John K. Hanft

Wills, Trusts, and Estates for
Legal Assistants

Sixth Edition



Part One

INTESTATE SUCCESSION

Chapter 2

DESCENT AND DISTRIBUTION

Chapter Objectives

- Understand why most people die intestate
- Describe how surviving spouses are protected under common law and under modern statutory systems
- Explain the various mechanisms used to determine the shares of decedents
- Distinguish between civil law and canon law degree of relationship systems
- Discuss the process of escheat

Reasons Most Individuals Die Intestate

- Lack of property
- Unaware of importance
- Indifference
- Cost
- Time and effort
- Complexity
- Admission of Mortality
- Reluctance to Reveal Private Facts

Intestacy

- Intestate
 - To die without a will
 - Law of intestate succession: how intestate property passes
 - Law of the state where decedent is domiciled determines how personal property is passed
 - Law of the state where property is located determines how real property is passed
 - State laws differ



Other Important Terms in Intestacy and Probate

- **Decedent:** The person who died; whose property comprises the estate that is begun administered due to death.
- **Descendant:** The decedent's children, grandchildren, after-born generations; the lineal blood relatives in decedent's "downline" of relatives



Passing of property by Intestate Succession

- Probate property
 - Passes after expenses with court supervision
- Nonprobate property
 - Passes directly to heirs without court supervision; no intestate succession applies



Passing of Property in Intestacy

- Property not included in will passes according to law of intestate succession
 - Will drawn without residuary clause
 - Person(s) named in residuary clause die before testator
 - Children omitted unintentionally from parents' will
 - Person refuses to accept gift



Passing of Property in Intestacy

- **Simultaneous death**
 - When family members, usually husband and wife, die at the same time and it is impossible to determine who died first
 - **Uniform Simultaneous Death Act**
 - Allows property of each person to be distributed as if he or she had survived, unless a will or trust provides otherwise



Basic Procedure for Determining Shares of Descendants

- **Step One:** identify intestate's children
- **Step Two:** determine if any predeceased child left a descendant who outlived intestate
- **Step Three:** ascertain state's method of handling multi-generation succession

Per Stirpes

- **Per stirpes distribution:** A system for distributing property in which distributees take shares by right of representation at the generation closest to the decedent.



Per Capita with Representation

- A system for distributing property in which distributees take shares by right of representation at the generation with living members closest to the decedent.

Note: also known as modern per stirpes. Virginia seems to follow this form; similar to per stirpes



Explanation of how to determine Modern Per Stirpes

- Following the family tree and the statute for descent and distribution (using Virginia statute for this example), find the first surviving family member(s):
 - Surviving Spouse of decedent?
 - Children of decedent?
 - Are any from prior relationship? (only if spouse survives too)
 - Mother and/or father of decedent?
 - Siblings of decedent?
 - Parents or Parents of decedent? Moiety for each?
 - And more, if needed to arrive at generation to determine shares



Per Capita at Each Generation

- A system for distributing property in which distributees of the same generation take equal portions of a share determined by right of representation at the generation with living members closest to the decedent.

Parentelic Systems

- A system of distributing shares of intestate property equally between maternal ancestors and collaterals and paternal ancestors and collaterals.

Degree-of-Relationship System

- A method for determining heirs by counting degrees of kinship between an heir and a decedent.



Civil Law Degree-of-Relationship System

- Determining degree-of-relationship by counting the steps from a decedent to an heir through a common ancestor and using the total number of steps.

Canon Law Degree-of-Relationship System

- Determining degree-of-relationship by counting the steps from a decedent to an ancestor and from an heir to that ancestor and using the larger number of steps.

Escheat

- **Escheat:** A process by which the property of an intestate passes to the state government.
- If the intestate dies without an heir who is entitled to take under the jurisdiction's intestacy statutes, the intestate's property reverts to the state government through the escheat process.

Note: very rare in Per Stirpes or Modern per stirpes as long as family tree can be followed to determine a living heir.



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Chapter 3

**TREATMENT OF CERTAIN
CATEGORIES OF POTENTIAL HEIRS**

Chapter Objectives

- Define posthumous heirs
- Explain the effect of adoption on inheritance rights
- Analyze the rights of stepchildren, non-marital children, and children from alternate reproductive technologies
- Describe the circumstances in which various categories of "unworthy heirs" are precluded from inheritance
- Understand the developing law of non-marital partners as heirs

Posthumous or Afterborn Heir

- An heir conceived before but born after an intestate's death.

Adult Adoption

- Most states make no distinction based on the age of the child at the time of the adoption. However, some states restrict inheritance rights if the adopted individual was an adult and had not lived with the adoptive parents while still a minor.
- The rules may also be different based on whether the adopted person is mentally challenged; that is, the adoption of a mentally challenged adult may create inheritance rights while the adoption of other adults would not.

Adoption by Estoppel

- Conduct resulting in adoption in the absence of required formalities.

Ascertaining the Identity of Heirs

- Need to consider the following:
 - Posthumous or Afterborn Heirs
 - Adopted Individuals
 - Non-marital Children
 - Children from Alternative Reproduction Technologies
 - Stepchildren
 - Half-blooded Collateral Heirs
 - Non-United States Citizens
 - Unworthy Heirs
 - Non-Marital Partners

Unworthy Heirs

- Forfeiture
- Civil Death
- Corruption of the Blood
- Heir Killing Intestate
- Suicide
- Parent's Failure to Support Child
- Adultery
- Abuse

Unmarried Partners

- If the partners are of opposite sexes, most states provide no inheritance rights to the surviving partner.
- Some states, however, recognize the concept of a ‘ ‘common law marriage’ ’ so that the surviving partner will be treated as a surviving spouse and be entitled to inherit even though the partners were not formally married.

Common Law Marriage

- The requirements of a common law marriage typically include the partners
 - 1) agreeing to be married,
 - 2) living together as husband and wife, and
 - 3) representing to others that they are married.
- In addition, some states, such as California, allow opposite-sex unmarried couples to register as domestic partners if at least one partner is over age sixty-two, which will then entitle the surviving partner to inherit the same share as a surviving spouse.

Same-Sex Partners

- A few states permit same-sex partners who are not legally married to obtain inheritance rights via other means such as by entering into a *civil union* or registering as a *domestic partner* or *reciprocal beneficiary*.



Chapter 4

Intestate Succession

About 67% in U.S. have no Will or Estate Plan

WHY?

*Lack of understanding importance
“don’t have much property”
indifference
cost, time and effort*



Learning Goals

- Contrast the law that governs the passing of real property with the law that governs the passing of personal property when someone dies intestate
- Describe when property passes according to the law of intestate succession
- State the share that a surviving spouse inherits under the law of intestate succession in your state



Learning Goals

- Identify the people, other than a surviving spouse, who will inherit and the share each will receive under the law of intestate succession in your state
- Indicate, under the law of your state, the disposition of property owned by people who die intestate survived by no spouse and no ascertainable kindred



Intestacy

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 - To die without a will
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 - Law of the state where decedent is domiciled determines how personal property is passed
 - Law of the state where property is located determines how real property is passed
 - State laws differ

The Passing of Intestate Property

- Probate property
 - Passes after expenses with court supervision
- Nonprobate property
 - Passes directly to heirs without court supervision; no intestate succession applies*

*Becomes probate property if designated beneficiary(ies) or surviving owner with rights of survivorship predeceased

The Passing of Intestate Property

- Property included in will passes according to law of intestate succession when:
 - Will drawn without residuary clause
 - Person(s) named in residuary clause die before testator
 - Children omitted unintentionally from parents' will
 - Person refuses to accept gift



Rights of Surviving Spouse

- Surviving spouse rights determined first
- Varies from state to state
- May depend on who else survives, such as children
- Divorce ends rights of surviving spouse
 - Legal separation does not end rights of surviving spouse



Rights of Other Heirs

- Determining rights of other heirs
 - Made after surviving spouse
 - Heirs: anyone who inherits property
 - Kindred: people related by blood
 - Next of kin: nearest of kindred to decedent



Rights of Other Heirs

- **CONSANGUINITY** (descended from same ancestor)
 - Lineal: related in direct line, either downward or upward
 - Collateral: related by ancestor, not direct line
- AFFINITY**: related by marriage
- HALF BLOOD**: share a common mother or father
 - Laws of intestate succession differ among states



Rights of Other Heirs

- Degrees of kindred
 - Determine relatives who are closest to decedent
 - Look to the degree of relationship
 - Closest ancestor to decedent

Rights of Other Heirs

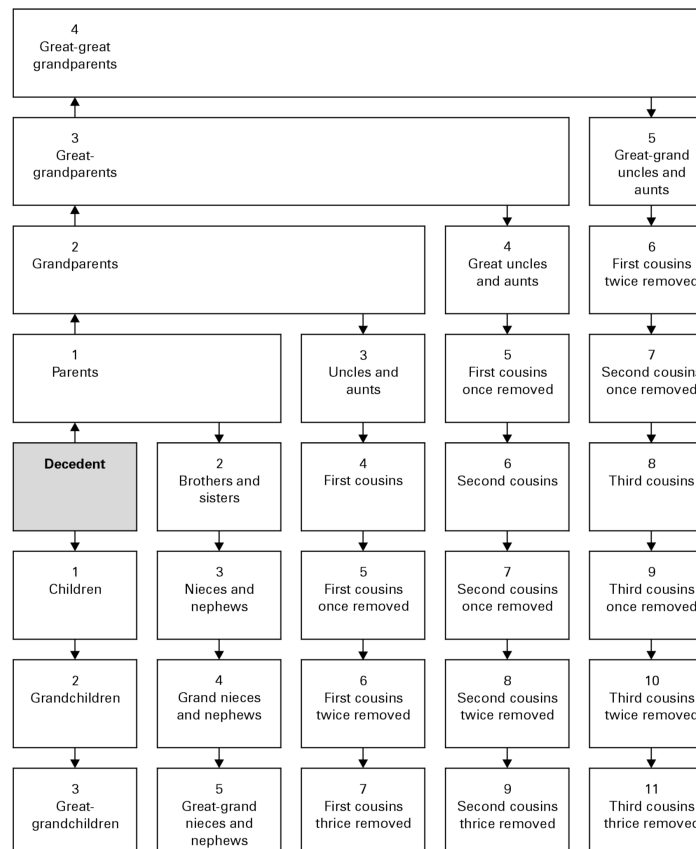


EXHIBIT 4-2 Degrees of Kindred



Rights of Other Heirs

- Lineal descendants
 - Related by common ancestor and often referred to as issue or descendants
 - Inherit per stirpes: children stand in place of their parents for purposes of inheritance
 - Inherit per capita: Each grandchild receives an equal share of their parent's share



Children: Rights of Other Heirs

- Posthumous issue
 - After-born children inherit the same as if born during lifetime of decedent
- Adopted children
 - If legally adopted, treated same as kindred or blood relatives
- Illegitimate children
 - Children born out of wedlock
 - Common law: could not claim part of estate
 - Modern times: can make a claim if paternity is determined

Rights of Other Heirs

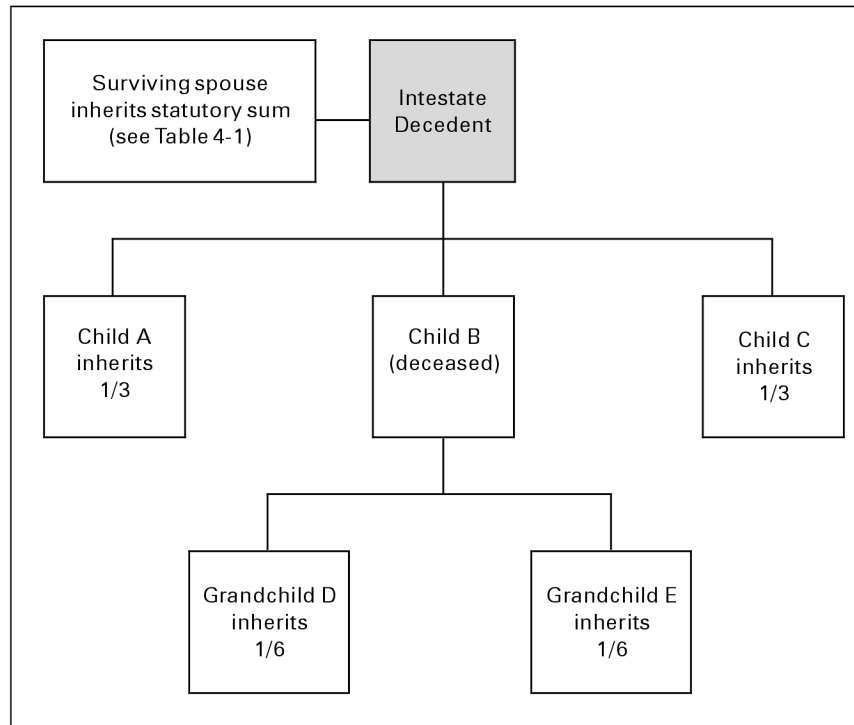


FIGURE 4-3 Rights of Children and Grandchildren of Intestate Decedent

When someone dies intestate and is survived by issue, the part of the estate not passing to a surviving spouse passes to the decedent's issue by right of representation.

Rights of Other Heirs

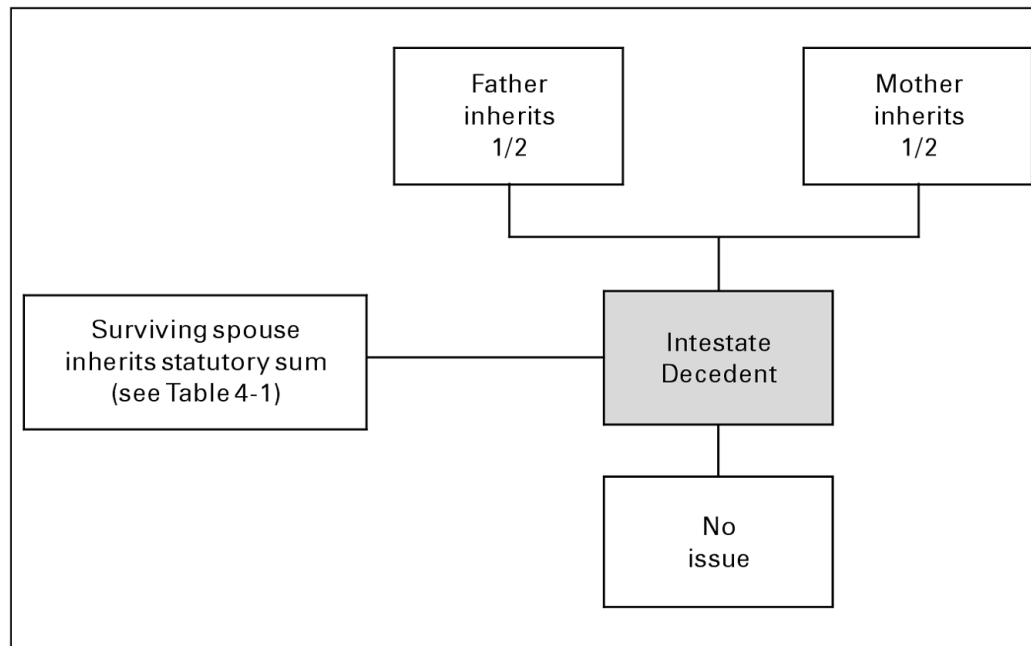


FIGURE 4-4 Rights of Parents of Intestate Decedent

When someone dies intestate survived by no issue, the part of the estate not passing to a surviving spouse passes to the decedent's father and mother equally or to the survivor of them.



Rights of Other Heirs

- Siblings
 - Brothers and sisters of the decedent
 - If survived by their children, nieces and nephews may be able to take by right of representation

Rights of Other Heirs

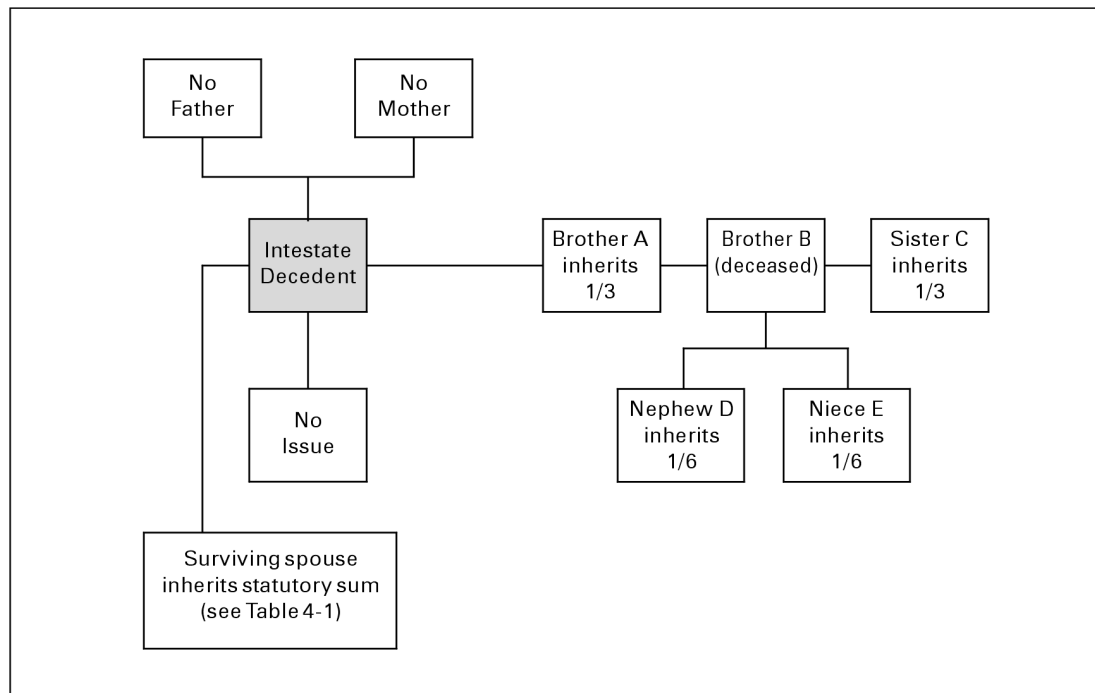


FIGURE 4-5 Rights to Siblings of Intestate Decedent

When someone dies intestate survived by no issue and no mother or father, the part of the estate not passing to a surviving spouse passes to the decedent's brothers and sisters, with the children of any deceased brothers and sisters taking their parent's share by right of representation.



Rights of Other Heirs

- Next of kin
 - Closest living blood relative
 - Grandparents
 - Aunts, uncles, and cousins

Rights of Other Heirs

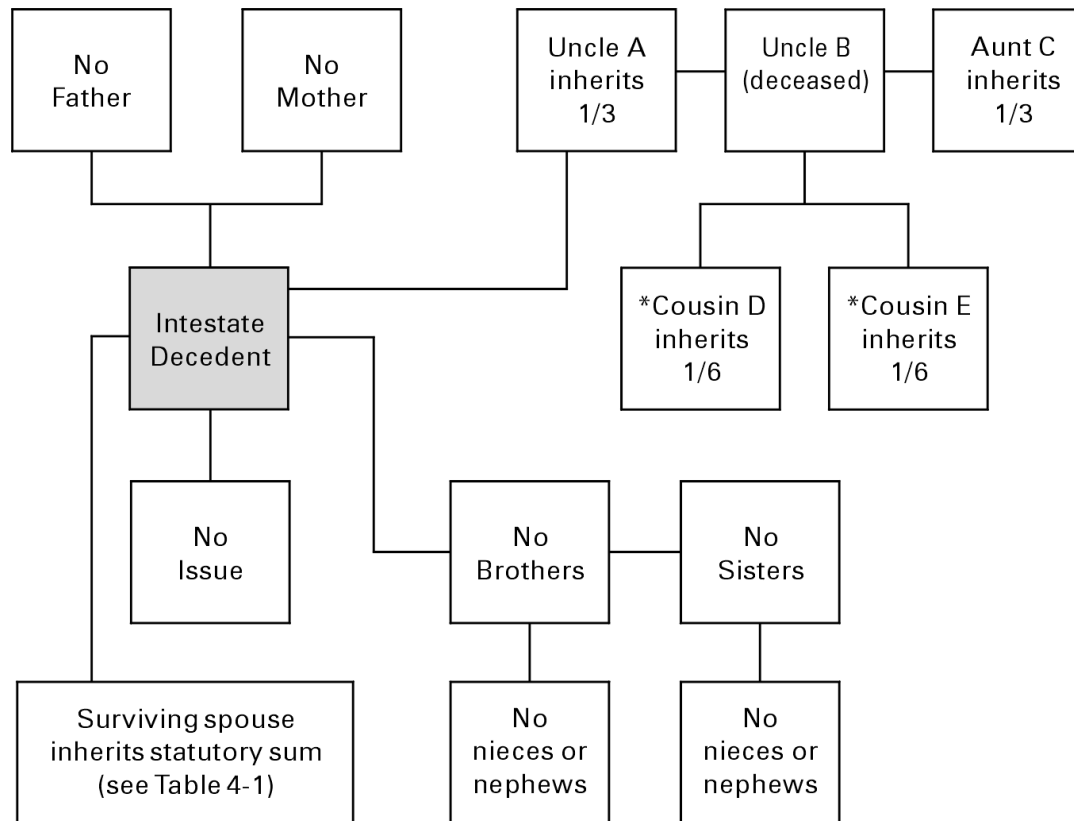


EXHIBIT 4-6 Rights of Extended Family of Intestate Decedent



Rights of Other Heirs

- Escheat (last resort)*
 - When people die without a spouse or kindred, property passes to state where they were domiciled
 - Determined by state law (varies among states)

*Some states recognize step-children as heirs to prevent escheat if no spouse or kindred found



Per Capita with Representation

- A system for distributing property in which distributees take shares by right of representation at the generation with living members closest to the decedent.

Note: also known as modern per stirpes. Virginia seems to follow this form; similar to per stirpes

Explanation of how to determine Modern Per Stirpes

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 - Parents or Parents of decedent? Moiety for each?
 - And more, if needed to arrive at generation to determine shares



In-Class Intestacy Exercise

- Winifred Whippersnap



Other Intestate Succession Issues

- Simultaneous death
 - When family members, usually husband and wife, die at the same time and it is impossible to determine who died first
 - Uniform Simultaneous Death Act
 - Allows property of each person to be distributed as if he or she had survived, unless a will or trust provides otherwise



The Passing of Intestate Property

- Homicide by heir or devisee
 - Does not allow persons to benefit from their own wrongdoing
 - Slayer statutes
 - Civil law
 - Proved by a preponderance of the evidence

Other Intestate Succession Issues

ADVANCEMENT

- A gift made during life that is intended to be an early distribution of the donee's share of an intestate donor's estate.
- Value of that gift is added to total value of estate and allocated as part of donee's share (hotchpot)



Other Intestate Succession Issues

Disclaimer

- ***The renunciation of an interest in a decedent's property:***
 - The disclaimer must be memorialized in a writing that is signed by the disclaiming heir.
 - The disclaimer document must be timely filed with the proper authorities.
 - A copy of the disclaimer instrument usually must be delivered to the administrator so the administrator knows not to deliver estate property to the heir.



Other Requirements for Valid Disclaimer

- Disclaimers are irrevocable.
- Partial disclaimers are allowed.
- If the heir has accepted the property or any of its benefits, it is too late for the heir to disclaim even if any applicable time period has not yet elapsed.
- The disclaimer must be unconditional.

Note: Disclaimed property passes as if person disclaiming pre-deceased the decedent.



Equitable Conversion

- Treating real property as personal or personal property as real for reasons of fairness.

Example: person dies before settlement on the contract for sale of his real estate.

Assignment or Release of Expectancy to Inherit

- A living person has no heirs, an heir apparent does not have an interest that rises to the level of being the heir's property.
- Instead, the hopeful heir's interest is a mere expectancy.
- Accordingly, an heir apparent has nothing to transfer.
- The heir apparent, however, may agree (1) to transfer the inheritance once received, or (2) not to claim a future inheritance.
- *Risky to Assignee and not always enforceable*

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Part Two

WILLS

Chapter 5

REQUIREMENTS FOR A VALID WILL



Chapter Objectives

- Analyze the elements of testamentary capacity
- Understand the formalities required for the proper execution of a will
- Explain the purposes of formal execution of a will
- Prepare an attestation clause and a self-proving affidavit
- Describe the requirements for a valid holographic will



Four Main Requirements for a Valid Will

- Legal capacity
- Testamentary capacity (Sound Mind)
- Testamentary intent
- Formalities

Ways in Which a Person May Acquire Legal Capacity

- Age
- Marital status
- Military service



Elements of Testamentary Capacity

- Testator comprehends action being taken and effect
- Testator knows nature and extent of his or her property
- Testator recognizes natural objects of his or her bounty
- Testator has elements in mind long enough to make reasoned judgment



Natural Objects of Bounty

- Spouse
- Children
- Parents
- Grandchildren
- Siblings



Testamentary Intent or Animus Testandi

Intent that an instrument serve as a testator's will



Purposes of Formal Execution

- Cautionary function
- Evidentiary function
- Protective function
- Channeling function

Recommended Witnesses

- Witnesses familiar with testator
- Supernumerary witnesses
- Youthful and healthy witnesses
- Traceable witnesses
- Witnesses who would favorably impress the court and jury

Attested Wills

- **Attested wills**, that is, wills that are witnessed, are the most common type of will.
- An attested will must be (1) in writing, (2) signed by the testator, and (3) witnessed.
- Despite relative uniformity among the states regarding these formalities, the specifics are often significantly different.



Attestation Clause

- A clause reciting that the testator duly executed the will.

Self-Proving Affidavit

- A **self-proving affidavit** is a statement by the testator and the witnesses affirming under oath that all the requirements of a valid will have been satisfied.
- Practically all states permit this affidavit to substitute for the in-court testimony of the witnesses when the testator's will is probated.
- In addition, the affidavit raises a presumption that the matters stated therein are true.
- Thus, the existence of a self-proving affidavit makes probating the will easier, faster, and more economical.

Execution Ceremony

- Select appropriate location
- Avoid interruptions
- Gather participants
- Seat participants strategically
- Make general introductions
- Explain ceremony
- Establish testamentary capacity
- Establish Testamentary Intent
- Conduct will execution
- Conduct witness attestation
- Complete a self-proving affidavit
- Conclude ceremony



After the Ceremony

- Confirm testator's intent
- Make copies of will
- Discuss safekeeping of original will
- Provide testator with post-will instructions



Approaches to Nonholographic Material

- Intent approach
- Surplusage approach
- Material provision approach



Holographic Will

- A will handwritten by the testator.



Uses of Holographic Wills

- Emergencies
- Privacy
- Interim will
- Entertainment



Nuncupative Will

- An oral will

Restrictions on the Validity of a Nuncupative Will

- Several states impose two or more of these types of limitations:
 - Types of property covered
 - Amount of property
 - Condition of testator
 - Location of speaking will
 - *Rogatio testium*
 - Number of witnesses
 - Proof
 - Notice



Notarized Will

- A few states dispense with the requirement of witnessing the will if the testator acknowledges the will in front of a notary public authorized to take acknowledgments. This procedure may be problematic, if the will needs to be probated in a state that does not permit notarization.

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Chapter 6

**CHANGING CIRCUMSTANCES
AFTER WILL EXECUTION –
PROPERTY**



Chapter Objectives

- Define and distinguish specific, general, demonstrative, and residuary gifts
- Identify ways in which a testamentary give may be adeemed
- Explain how a change in the value of property impacts a testator's planned distribution
- List the order in which testamentary gifts abate
- Describe the concept of tax apportionment



Classification of Testamentary Gifts

- Devise
- Bequest
- Legacy
- Specific gift
- General gift
- Demonstrative gift
- Residuary gift
- Private gift
- Charitable gift



Types of Gifts

- **Legacy:** A testamentary gift of money
- **Demonstrative gift:** A general testamentary gift to be paid from a designated source
- **Residuary gift:** A testamentary gift of property remaining after specific, general, and demonstrative gifts are satisfied
- **Private gift:** A gift to an individual for personal enjoyment
- **Charitable gift:** A gift to a qualifying entity for social benefit

Ademption by Extinction

- **Ademption by extinction:** The failure of a specific gift because the property is not in the testator's estate at death.
- **Identity theory of ademption:** a gift is adeemed if the exact item is not in the testator's estate.
- **Intent theory of ademption:** a gift may be saved from ademption by tracing or other circumstances.



Ademption by Satisfaction

- The failure of a specific gift because the property has been transferred to the beneficiary before death



Appreciation and Depreciation

- The **appreciation** (an increase in value) or **depreciation** (a decrease in value) of specifically gifted property between the time of will execution and time of death is not considered when distributing the testator's property.
- The beneficiary of a specific gift receives that item, regardless of any changes to its value.

Order of Abatement

1. Intestate property
2. Residuary gifts
3. General gifts
4. Specific gifts



Tax Apportionment

- Death taxes are apportioned as charges to individual gifts rather than charged to a residuary gift.

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Chapter 7

**CHANGING CIRCUMSTANCES
AFTER WILL EXECUTION –
PERSONS**



Chapter Objectives

- Explain the concept of a surviving spouse's forced or elective share
- Discuss how marriage or divorce changes a testator's planned distribution
- Define pretermitted heir
- Understand the concept of lapsed gifts and how anti-lapse statutes operate
- Describe the operation of the cy pres doctrine



Forced or Elective Share

- A surviving spouse's statutory right to a portion of the deceased spouse's estate in lieu of the benefits, if any, provided in the will.



Methods for Computing Forced Share (slide 1 of 3)

- Fixed percentage of net probate estate
- Fixed percentage subject to percentage to children
- Minimum dollar amount plus fixed percentage of additional property
- Variable percentage depending on length of marriage

Methods for Computing Forced Share (slide 2 of 3)

- A fixed percentage of the net probate estate, for example, one-third.
- Fixed percentages of the net probate estate depending on the number of children, with the surviving spouse receiving a smaller percentage if the deceased spouse had children, for example, one-half if no children, one-third if children.

Methods for Computing Forced Share (slide 3 of 3)

- A minimum dollar amount plus a fixed percentage of any additional property in the net probate estate, for example, the first \$100,000 plus one-third of any excess.
- Variable percentages depending on the length of the marriage, for example, UPC § 2-202, which begins at 3 percent for a marriage lasting one to two years and increases to 50 percent for marriages of fifteen or more years.

Pretermitted Child

- A child unintentionally omitted from a will.



Excluded Situations (Pretermitted Children)

- Testator's will actually provides for the pretermitted child.
- Testator provided for the pretermitted child by way of a nonprobate transfer.
- Extrinsic evidence demonstrates the testator's intent to exclude pretermitted children.
- Testator's will demonstrates an intent for pretermitted children not to share in the testator's estate.
- Testator's entire estate is left to the pretermitted child's other parent.



Lapsed Gift

- An intended gift that does not take effect because the beneficiary has predeceased the testator or is treated as having done so.



Anti-Lapse Statute

- A statute that provides for substitute beneficiaries to prevent a lapsed gift.



Cy Pres

- A doctrine of equitable approximation authorizing a court to substitute a charitable beneficiary or purpose for a testamentary charitable gift that is impossible or impractical to fulfill.



Survival Statute

- A statute specifying a minimum period by which a beneficiary must outlive the testator to take a testamentary gift.



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Chapter 8

REVOCATION OF WILLS

Chapter Objectives

- Identify situations in which a will is revoked by operation of law
- Explain how a will can be revoked by a physical act
- Describe the kinds of subsequent writings that operate to revoke a will
- Analyze the conditions under which a presumption of revocation operates
- Discuss the circumstances in which a revoked will may be revived

Categories of Revocation

- Operation of law
- Physical act
- Subsequent writing

Circumstances that Trigger a Revocation by Operation of Law

- Marriage of testator - *allows for force share in most states*
- Divorce of testator - *provision for spouse void in most states if Will written during marriage*
- Pretermitted heirs - *provisions for inadvertent omission*
- Death of beneficiary - *revokes if death before testator and not covered by anti-lapse statute*



Additional Circumstances that May Trigger Revocation

- Beneficiary killed testator - *cannot inherit! Bad strategy*
- Alienation - *if gifted during lifetime, cannot gift by Will*
- Elapse of time - *Will distributes exactly as written; make sure your Will provisions are up to date with value of your estate*
- Change in feelings toward beneficiary - *Will not affect distribution as written in Will. If you want it different, make a new Will or Codicil*

Revocation by Physical Act

- Capacity
- Intent
- Physical act
- Simultaneous existence of elements

Physical Acts of Revocation

- Burning
- Tearing
- Canceling
- Obliterating
- Destroying

Physical Revocation by Proxy

- Act at testator's direction
- Act in testator's conscious presence

Revocation by Subsequent Writing

- New will
- Codicil
- Document of revocation
- Express Revocation: A statement in a later will expressly revoking a prior will.

Revocation by Inconsistency

- Provisions in an earlier document are revoked by inconsistent provisions in a later document.
- But provisions in earlier document that do not conflict with later Will may stand IF the prior Will is not revoked!

Presumption of Revocation

- Presumption that the testator revoked his or her will if it cannot be found at death.

Revival

- **Revival** refers to the reinstatement of a will that the testator has already revoked.
- A testator could trigger revival by simply reexecuting the old will or by including an express statement in a new will that the old will is to be effective.

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Chapter 9

INTERPRETATION AND CONSTRUCTION

Chapter Objectives

- Define and distinguish patent and latent ambiguities
- Explain the concept of incorporation by reference
- Understand the use of pour-over provisions
- Identify precatory language
- Analyze the problems associated with class gifts



Ambiguity

- **Patent ambiguity:** provision unclear on its face.
- **Latent ambiguity:** provision that conveys a sensible meaning on its face, but cannot be carried out without further clarification.
- **No apparent ambiguity:** arises when the will provision is neither latently nor patently ambiguous but someone wants to introduce extrinsic evidence that the testator did not mean for the will to say what it appears to say.



Requirements for Successful Incorporation by Reference

- Intent
- In existence
- Identification
 - Important Note:
- Most commonly used for tangible personal property disposition. Some states (including Virginia) have a Statute to permit incorporation of a list by reference to the Code Section that makes the provision Mandatory.



Pour-over Provision

- A provision in a will making a gift to an inter vivos trust.

Class Gift

- A **class gift** is a gift to a group of beneficiaries designated by a generic reference rather than by their individual names.
- When class gifts may close:
 - Natural closing
 - Rule of convenience



Resolving Class Gift Issues

- To resolve class gift issues, the testator should carefully explain the categories of individuals the testator wishes to encompass within a class gift.
- For example, a class gift to children should address adopted-in minors, adopted-in adults, adopted-out individuals, and children born out of wedlock.
- Courts are extremely willing to follow the testator's intent as expressed in the will even if that intent is contrary to normal construction rules.



Avoiding External Integration

- All testamentary instruments should state the date of execution so the temporal order of the documents is easy to determine.
- A testator should execute an entirely new will rather than use a codicil.
- A will revoked by a subsequent writing should also be revoked by physical act (unless the testator is saving the old will for possible use as an unrevoked prior will, should the new will be deemed invalid.)

Interpretation versus Construction

- **Interpretation:** determining the testator's actual intent from the language of the will or from extrinsic evidence.
- **Construction:** assigning meaning to the language of a will where the testator's intent cannot be fully ascertained.

Maxims of Construction (1 of 2)

- The fact that the testator executed a will, especially if it contains a residuary clause, demonstrates an intent not to die intestate.
- If several provisions of a will conflict, the provision located nearest the end of the will takes precedence.
- A will is construed as a whole and not from isolated parts out of context.
- If a will is subject to two constructions and there is no evidence for preferring one over the other, the construction that treats individuals who are equally related to the testator in the most similar manner is preferred.

Maxims of Construction (2 of 2)

- A statement in a will explaining the reason the testator is making a will is merely a statement of inducement and does not make the will conditioned on the testator's death being caused by the stated reason.
- Legal terms in a will are given their specialized meanings unless there is evidence that the testator, especially if the testator was not an attorney, used the terms in a different manner.
- Nonlegal terms in a will are given their plain and ordinary meanings.

Facts of Independent Significance

- The doctrine allowing the use of circumstances outside the will to affect the disposition of property made in the will.

Dead Person's Statute

- A statute limiting the admissibility of evidence of what a testator said or did if the testimony is being offered by a party to the action

Tax-Based Modifications

- In 2008, § 2-806 was added to the Uniform Probate Code. This provision allows modification to achieve the testator's tax objectives.
- Section 2-806 provides that the court may make a modification of an instrument, including one that is retroactive, to achieve tax objectives so long as the modification is not contrary to the testator's probable intent, even if there is no direct evidence that the testator would have made the specific tax-motivated modifications.

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Chapter 10

WILL CONTESTS

Chapter Objectives

- Identify the elements of undue influence
- Explain the ethical problems confronting a drafting attorney who is also a beneficiary
- Differentiate fraud in the inducement from fraud in the execution
- Draft a no-contest clause
- Describe the steps that can be taken to prevent will contests

Grounds for Contesting Wills

- Failure to satisfy requirements of a valid will
- Insane delusions
- Undue influence
- Duress
- Fraud
- Mistake

Insane Delusion

- The testator's mind is so warped by a false and unfounded belief that the testator cannot make a rational disposition of property.
- Components of insane delusion:
 - Testator believes to be true something that is actually false.
 - No credible evidence supports that belief

Elements of Undue Influence

- Influence exerted over the testator must be undue.
- Influence must subvert the testator's mind.
- Influence must cause the testator to execute a will the testator would not have signed but for the influence.



Fraud

- **Fraud in the execution (fraud in the factum):** the testator is deceived about the identity of the document or the contents of the will.
- **Fraud in the inducement:** the testator is deceived about an extrinsic fact that results in a provision the testator would not otherwise have included in the will.



Basic Elements of Fraud

- False representation
- Knowledge of falsity
- Reasonably believed
- Causation

Mistake

- A testator's false belief that is not induced by another or is induced by another's innocent misrepresentation.



No-Contest Provision

- Clause providing that a beneficiary who contests the will loses some or all benefits under the will; also called *in terrorem* clause or *forfeiture* clause.



Tortious Interference with Expectancy

- Tortious interference with expectancy is a tort action in which the plaintiff seeks to recover damages from a third party.
- Not all states recognize this tort and the elements vary among the states that permit this cause of action.
- Typically, the plaintiff must prove five things:
 - 1) The existence of an expectancy (e.g., to be an heir, beneficiary of a will, or recipient of a non-probate transfer).
 - 2) A reasonable certainty that the expectancy would have been realized but for the interference of the defendant.
 - 3) The defendant intentionally interfered with the expectancy.
 - 4) The defendant's intentional interference was fraudulent or otherwise tortious.
 - 5) Damages.

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Part Four

NONPROBATE TRANSFERS

Chapter 13

REASONS PEOPLE USE NONPROBATE TRANSFERS



Chapter Objectives

- Discuss the common reasons for making nonprobate transfers
- Explain the consequences of probate delay
- Identify expenses associated with estate administration
- Define and distinguish the probate estate and the taxable estate
- Analyze how nonprobate transfers can impact the claims of creditors



Reasons for Using Nonprobate Transfers

- Provide non-estate planning benefits
- Accelerate asset distribution
- Reduce estate planning and administration expenses
- Enhance confidentiality
- Minimize taxes
- Retain flexibility
- Change estate plan with less difficulty
- Protect assets from creditors
- Isolate estate plan from challenge
- Increase understandability



Consequences of Probate Delay

- Heirs and beneficiaries are unable to use property
- Property suffers from a gap in management
- Emotional impact of lengthy administration is prolonged



Typical Expenses of Estate Planning and Administration

- Attorney's fees
- Personal representative's fees
- Court costs

Probate Estate and Taxable Estate

- Some nonprobate transfer techniques have the potential of saving the decedent a considerable amount of income, gift, and estate taxes. It is important to note that many nonprobate transfers may have no tax effect or an unanticipated effect and thus must be used with caution in estates large or complex enough to make tax planning an issue.
- The **taxable estate**—the property that is subject to federal or state death taxes--may include many assets that are not part of the decedent's **probate estate**.
- Be careful when you use the terms “probate estate” and “taxable estate”; do not use them interchangeably.

Nonprobate Transfers

- Intestate succession is inflexible; property passes without regard to the decedent's intent.
- A will provides many opportunities for the testator to control the transfer of property, but there are limits on what a testator can do in the will and the disposition is not effective until the testator dies and the will is properly probated.
- Many nonprobate transfers allow their users to exert greater control and individualization over the use and distribution of assets.
- In addition, nonprobate transfers may be able to provide the testator with immediate benefits such as tax savings and disability protection.

Practice Tip

- When planning an estate for which gift or estate taxes might be due, all past and present nonprobate transfers should be documented. This will expedite calculation of the tax.

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Chapter 14

INTER VIVOS TRANSFERS

Chapter Objectives

- List the elements of an inter vivos gift
- List the potential benefits and disadvantages of inter vivos gifts
- Explain the operation of a power of appointment
- Differentiate between vested and contingent remainders
- Describe the mechanisms available for making transfers of property to minors



Inver Vivos Gift

- A gift made during life.



Requirements to Qualify as an Outright Inter Vivos Gift

- 1) **Present Donative Intent.** The donor (person transferring property) must have the present intent to make a gratuitous transfer.
- 2) **Delivery.** The property must be delivered to the donee (person receiving property).
- 3) **Acceptance.** The donee must accept the property.



Benefits of Inter Vivos Gifts

- Donee's immediate enjoyment
- Donor satisfaction
- Donor relieved of responsibility
- Tax reduction
- Creditor protection
- Reduce elective share of surviving spouse



Potential Disadvantages of Inter Vivos Gifts

- Irrevocability
- Lack of control
- Leverage reduction
- Jealousy
- Minors and incompetents lack legal capacity
- Transfer taxation



Future Interests

- An ownership interest in property in which enjoyment takes effect on the occurrence of a designated event.

Vested and Contingent Remainder

- The most common type of future interest a donee may receive is the **remainder**.
- There are two basic types of remainders. First, the **vested remainder**, which gives the donee the right to obtain possession of the property as soon as the preceding estate terminates.
- Second, the **contingent remainder**, which permits the donee to obtain possession of the property only if a condition precedent is satisfied.

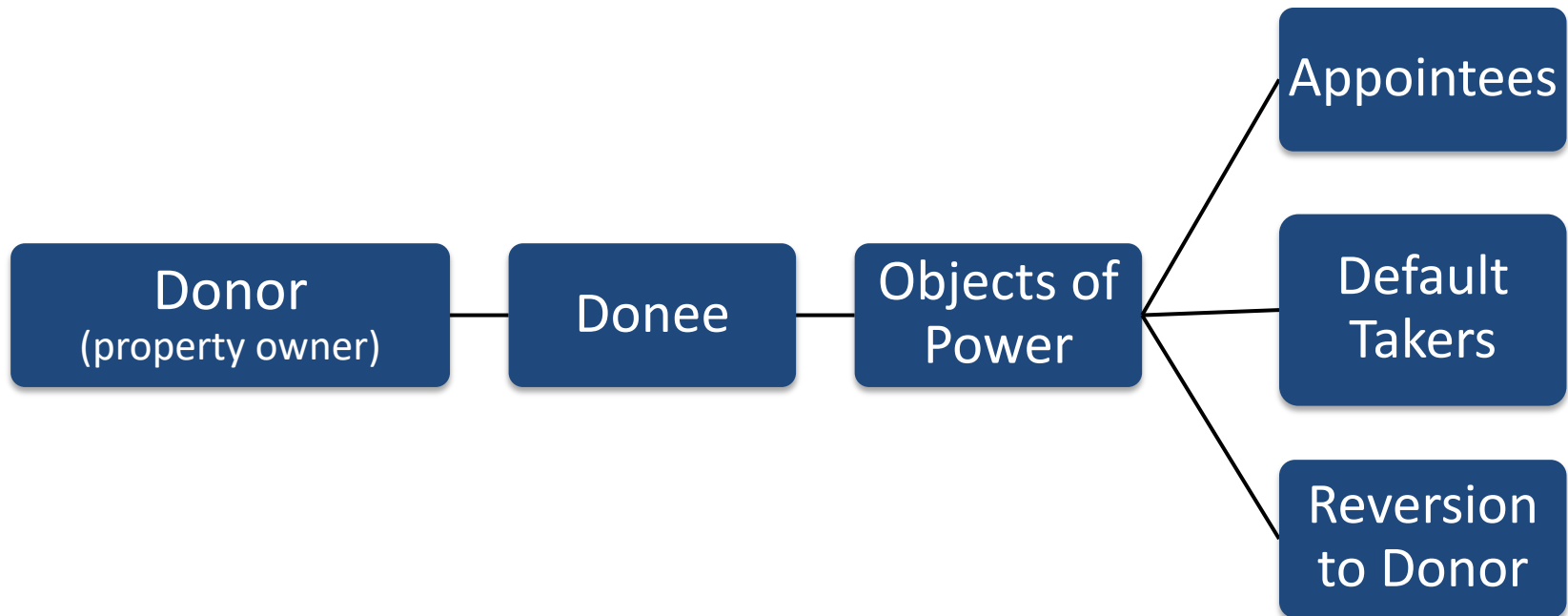


Persons in Power of Appointment Relationship

- Donor
- Donee
- Objects of the power
- Appointees
- Default takers



Power of Appointment



Transfers to Minors

- Minors lack the legal capacity to manage property. Thus, donors who wish to make inter vivos gratuitous transfers to benefit minors need to select an appropriate method to transfer the property. Donors have several techniques available to them.
 - First, the donor could simply make the transfer directly to the minor.
 - Second, the donor could place the property in trust for the benefit of the minor.
 - Third, the donor may transfer the property to a *custodian* for the minor.

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Chapter 15

CO-OWNERSHIP OF PROPERTY

Chapter Objectives

- Explain the attributes of property held in tenancy in common
- Explain the attributes of property held in joint tenancy
- Describe the circumstances in which a gift of joint tenancy property becomes irrevocable
- Define tenancy by the entirety
- Understand the ownership of marital property under a community property system



Types of Co-Ownership

- Tenancy in Common
- Joint Tenancy
- Tenancy by the Entirety
- Community Property



Tenancy in Common

- Concurrent property ownership in which two or more persons (cotenants) own equal or unequal undivided fractional shares of the property, on death, a cotenant's share passes by testate or intestate succession.



Joint Tenancy

- Concurrent property ownership in which two or more persons (joint tenants) own equal undivided fractional shares of property with right of survivorship; on death, a joint tenant's share passes to the remaining joint tenants by operation of law.



Survivorship

- **Survivorship:** the right to succeed to property on a joint tenant's death by operation of law.
- At common law, the survivorship feature attached automatically to a joint tenancy. The presumption of survivorship often led to unanticipated property distributions as co-owners held as joint tenants when they intended to hold as tenants in common. Non-legally trained individuals did not appreciate the significant difference between these two types of concurrent ownership. Consequently, many states now provide that the survivorship feature does not attach to a joint tenancy unless it is expressly stated in the instrument.

Tenancy by the Entirety

- Special kind of joint tenancy between spouses.



Community Property Marital Property System

- A system in which one-half of each spouse's income vests in the other spouse.
- Nine states use a **community property marital property system**—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.



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Chapter 16

MULTIPLE-PARTY ACCOUNTS

Chapter Objectives

- Define and distinguish the common types of multi-party accounts
- Differentiate the ownership rights in a joint account during life and after the death of a party
- Differentiate the withdrawal rights in a joint account during life and after the death of a party
- Explain how a pay on death account operates
- Describe the attributes of a trust account



Types of Multiple-Party Accounts

- **Joint account:** Account payable on request of one of two or more account holders.
- **Agency or convenience account:** Joint account without survivorship rights.
- **Pay-on-death account:** Account payable to a designated person on the death of all original depositors.
- **Trust account:** Account held in a revocable trust for a beneficiary.

Multiple-Party Account Issues

- Ability to Alter Contract by Will
- Creditors
- Divorce
- Survival
- Effect of Depositor's Incapacity

Ownership Rights: Joint Accounts

- During the lifetime of all parties, a joint account belongs to the parties in proportion to the net contributions by each party to the amount on deposit unless there is clear and convincing evidence of a contrary intent.
- A joint account does not operate to transfer current ownership of deposited funds to the other joint parties.
- The contributing depositor to a joint account does not make a gift to another party until that party withdraws more than that party's net contributions and the contributing depositor has the intent to make a gift of this excess.



Withdrawal Rights: Joint Account

- Although ownership of the funds in a joint account is in proportion to net contributions, each party has the virtually unlimited right to withdraw any or all of the money in the account.
- Consequently, it is extremely important that parties to a joint account trust each other.

Rights after Death of a Depositor

- Two results are possible when one of the parties to a joint account dies: the deceased party's net contributions pass either (1) through the deceased party's estate to the party's heirs or will beneficiaries, or (2) to the surviving joint parties.
- To resolve this issue, it must be determined whether the joint account includes the survivorship feature.
- Any party to a joint account has the right to withdraw any and all of the funds on deposit, before or after the death of another party, even if the withdrawing party does not have ownership rights to the withdrawn funds.
- If a surviving party to a nonsurvivorship joint account withdraws an amount in excess of the party's net contributions, the party will be liable to the estate of the deceased party for conversion.

Payable-on-Death Account

- A **payable-on-death account** (P.O.D.) becomes payable to designated persons, the P.O.D. payees, only after the death of all original depositors.
- The funds in the account belong to the original depositors during their lifetimes in proportion to each depositor's net contribution.
- The original depositors have the unrestricted right to withdraw any or all funds at any time and for any reason.
- The P.O.D. payees are not entitled to notice of withdrawals and neither their consent nor their approval is required.



Trust Accounts

- A **trust account** is an account in a form such as “Depositor in trust for Beneficiary” or “Depositor, trustee for Beneficiary.”
- Trust accounts, also called *savings account trusts* or *tentative trusts*, operate in much the same way as P.O.D. accounts; that is, upon the death of all trustees, the surviving beneficiaries divide the balance remaining in the account.

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Chapter 17

CONTRACTS

Chapter Objectives

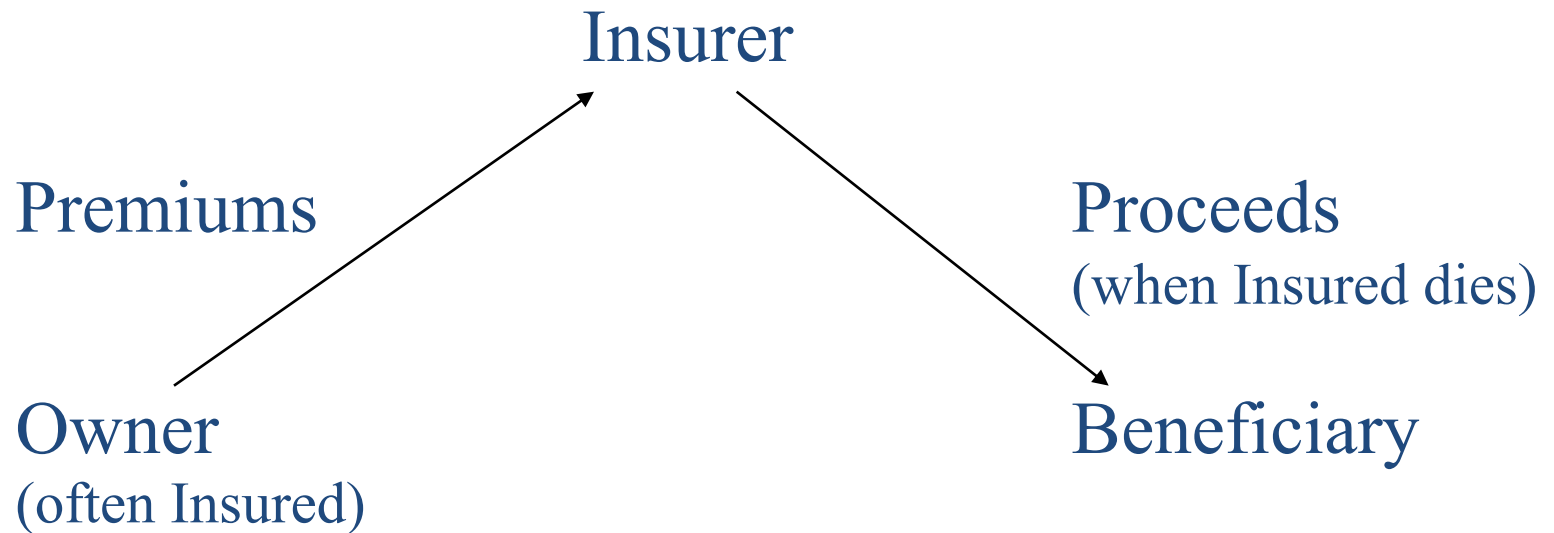
- Explain how life insurance operates
- Identify the primary types of life insurance and their attributes
- Explain how an annuity operates
- Identify the primary types of annuities and their attributes
- List the major types of employee benefit plans

Contractual Arrangement in Common Use

- Life Insurance
- Annuities
- Employee Benefit and Retirement Plans
- Transfer on Death Arrangements



Owner/Insured Relationship



Types of Life Insurance

- **Term:** Insurance proceeds are paid if the insured dies during a designated term.
- **Whole:** Insurance proceeds are paid when the insured dies at any time.
- **Universal:** Whole life insurance in which the cash value receives a competitive rate of return.
- **Endowment:** Whole life insurance in which premiums stop at a younger age and the cash value equals the face value at that time.
- **Split dollar:** An insured and the insured's employer both contribute to premiums and the employer receives a share of the proceeds.

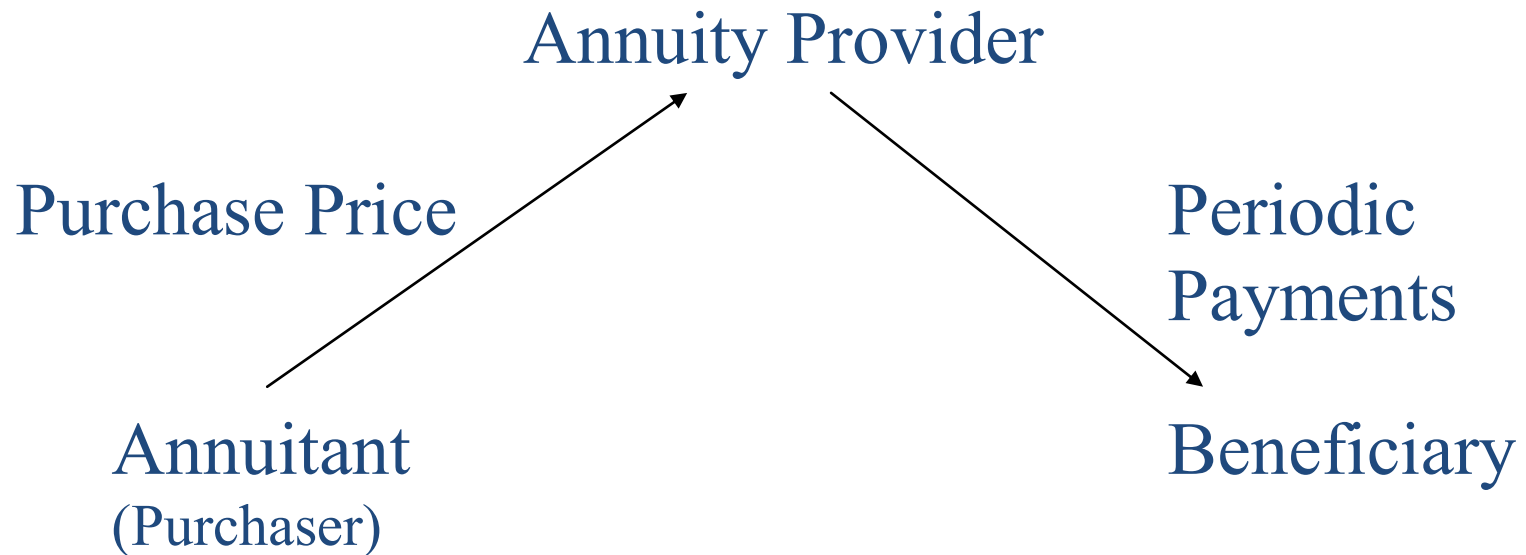
Payment Methods

- Lump sum
- Installments
- Interest or deposit

Annuity

- Contract between an annuity provider and purchaser in which, on payment of a lump sum, the provider agrees to make periodic payments to an annuitant for life or for a fixed term.

Basic Operation of an Annuity



Types of Annuities

- **Commercial annuity:** annuity purchased from a company in the business of selling annuities (e.g., an insurance company).
- **Private annuity:** annuity purchased from a private individual (e.g., a family member).
- **Joint life annuity:** annuity payments are made until the
 - first of two annuitants dies.
- **Joint and survivorship annuity:** annuity payments are made until both of two annuitants die.
- **Straight annuity:** annuity payments are equal.
- **Variable annuity:** the amount of annuity payments depends on the investment success of the annuity provider.

Types of Employee Benefit Plans

- Defined benefit plan
- Defined contribution plan
- 401(k) plan
- Employee stock option plan (ESOP)
- Keogh plan
- H.R.-10 plan
- Individual retirement plan (IRA)
- Simplified employee pension plan (SEP)

PROPERTY

- The Basic Categories, Types and Important Terms

Personal Property

- Personal property is all non-real property.
- Typical examples are cars, jewelry, books, furniture, stocks, and cash. Also, rights that a person might acquire, such as right of exclusive ownership of an artistic work he or she created.

Real Property

- Real property consists of land and anything permanently affixed to the land such as a home, garage, office building, and so forth, including air and ground rights

Freehold Estates and Leaseholds

- Real property falls into two major categories:
 - A freehold estate is any realty that a person owns absolutely for an uncertain duration
 - a leasehold is any realty that a person holds for a specified period of time, usually documented by a rental agreement or a lease.

Common Terms Associated with Transferring Rights to Realty

- **Conveyance:** any transfer of title to real property from one person to another.
- **Deed:** a document signed by the parties that transfers title to real estate.
- **Tenancy:** the right to hold real estate.
- **Title:** the right of ownership or possession in property.
- **Fee simple:** the largest estate possible and represents an absolute and undivided interest in the real property. A person who holds property in fee simple has the right to transfer the property during life or at death, and creditors of the owner can attach the property to satisfy claims because it is owned absolutely by the fee holder. It is also called a tenancy in severalty if only one person holds title to the property.

Important Categories: Personal Property

- Tangibles:
 - Cars
 - Electronic equipment
 - Jewelry
 - Furs
 - Arts and antiques
 - Collectibles
 - Furnishings
 - Household effects
- Intangibles:
 - Bank accounts
 - Intellectual property
 - Stocks
 - Bonds
 - Business property
 - Insurance policies
 - Pension plans
 - Annuities
 - Promissory notes
 - Licenses



Digital assets

- Digital assets, also known as virtual assets, are defined as electronic resources that can be owned or controlled and are electronically stored or maintained on computers and related technology.
- These assets fall into four main categories:
 - (1) personal assets;
 - (2) financial assets;
 - (3) social media; and
 - (4) business assets

WILL DRAFTING

Sample Form and Format

Guidelines for Drafting a Will

- Tailored to individual needs of testator
- Provisions in one will may be inappropriate or dangerous for another's will
- Generic forms that meet requirements of one state are not always appropriate for other states
- **Should minimize death taxes**
- As tax laws change, will should be reevaluated
- Should review will every 5 years

Introductory Paragraphs

- Exordium clause
 - Opening paragraph of will
 - Identify testator
 - State domicile
 - Declare last will and testament
 - Revoke all prior wills

Introductory Paragraphs

- Funeral arrangements
 - Not advisable to include in will
 - Will may not be found until later
- Instructions to pay debts
 - Not necessary because debts required to be paid by law

Ending Paragraphs

- Testimonium Clause
 - Closing paragraph before signature
- Attestation Clause
 - Clause following testator's signature and precedes the witness signatures
- Self-Proof Clause and/or Self-Proving Affidavit
 - Statutory provision that allows the will to be self-proven and avoid the appearance of witnesses at time of probate

Sample Will

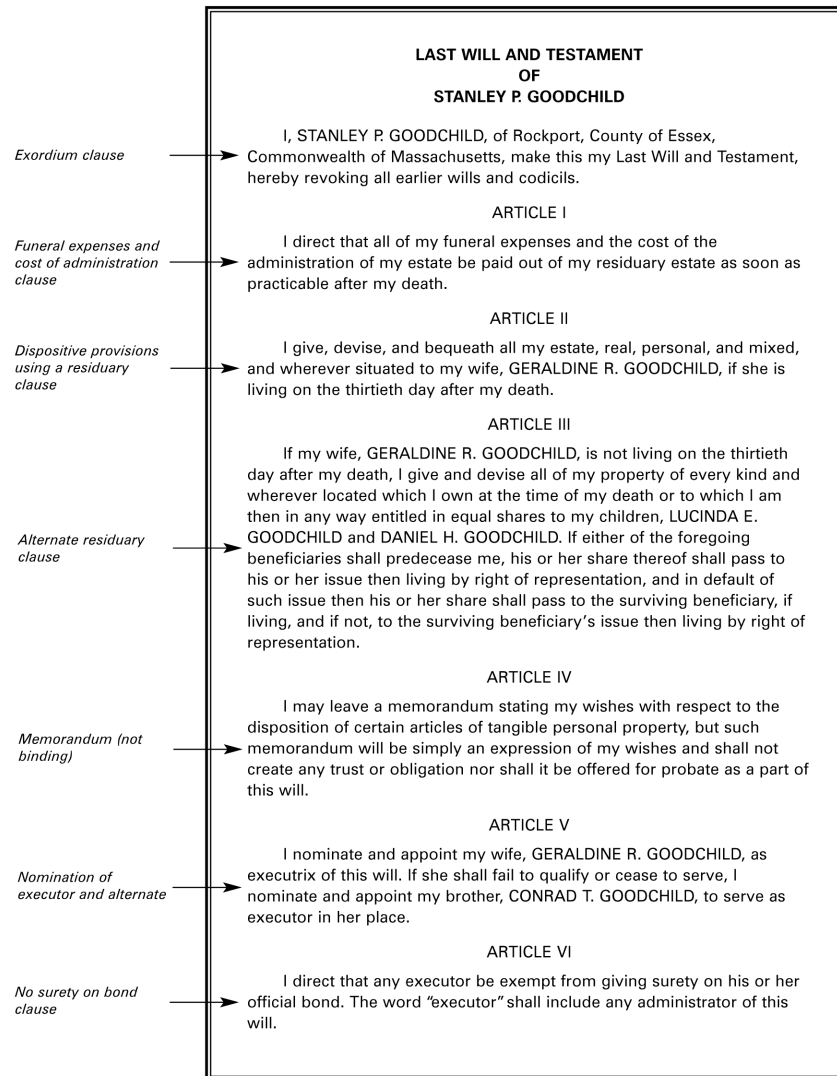


FIGURE 6-1 Sample Will with Clauses Defined

Sample Will

	ARTICLE VII				
<i>Appointment of guardian and alternate no surety on bond clause</i>	I appoint my wife, GERALDINE R. GOODCHILD, as guardian of the person and property of my minor children. If for any reason she shall fail to qualify or cease to serve, I appoint my sister, MAUREEN N. LANDERS, to serve as guardian in her place. No guardian appointed in this will or any codicil need furnish any surety on any official bond.				
	ARTICLE VIII				
<i>Powers of executor</i>	My executor shall have full power of management and authority to sell, either at public or private sale, or to exchange, lease, pledge, or mortgage, in such manner and on such terms as such executor deems advisable, any or all property, real or personal, in my estate and to execute all deeds, assignments, mortgages, leases, or other instruments necessary or proper for these purposes; to compromise claims in favor of or against my estate on such terms as such executor deems advisable; to retain any securities or other property owned by me at the time of my death, although the same may not be considered a proper investment; to make distribution of property in kind, and for such purposes to determine the value of such property; and generally to do any and all such acts and things and execute any and all such written instruments with respect to such property as if the absolute owner thereof.				
<i>Testimonium clause with self-proof affidavit</i>	I, the undersigned testator, do hereby declare that I sign and execute this instrument as my last will, that I sign it willingly in the presence of each of said witnesses, and that I execute it as my free and voluntary act for the purposes herein expressed, this 2nd day of January, 2002. <div style="text-align: right;">_____ Stanley P. Goodchild</div>				
<i>Attestation clause with self-proof affidavit</i>	We, the undersigned witnesses, each do hereby declare in the presence of the aforesaid testator that the testator signed and executed this instrument as his last will in the presence of each of us, that he signed it willingly, that each of us hereby signs this will as witness in the presence of the testator, and that to the best of our knowledge the testator is eighteen (18) years of age or over, of sound mind, and under no constraint or undue influence. <table border="0" style="width: 100%;"><tr><td>_____ (Witness)</td><td>_____ (Address)</td></tr><tr><td>_____ (Witness)</td><td>_____ (Address)</td></tr></table>	_____ (Witness)	_____ (Address)	_____ (Witness)	_____ (Address)
_____ (Witness)	_____ (Address)				
_____ (Witness)	_____ (Address)				
<i>Self-proof affidavits sworn to before notary public</i>	COMMONWEALTH OF MASSACHUSETTS COUNTY OF ESSEX Subscribed, sworn to, and acknowledged before me by the said testator and witnesses this 2nd day of January, 2002. <div style="text-align: right;">_____ Notary Public My commission expires:</div>				

FIGURE 6-1 (continued)



Dispositive and Fiduciary Clauses

- These are the heart of the Will.
- They tell who inherits what.
- They name an executor/executrix
- They name guardian(s) of person and property of minor children
- They provide fiduciary powers and tax provisions

Main Body

- Dispositive provisions
 - Specific legacy: gift of identifiable personal property
 - Subject to ademption: no gift if the asset does not exist at time of death
 - Personal property passes to personal representative, who distributes to heirs
 - Specific devise: a gift of identifiable real property
 - Real property passes directly to heirs



Main Body

- Dispositive provisions
 - General legacy: gift of personal property from general assets of estate
 - Gift of money that is general legacy is also known as pecuniary legacy
 - Demonstrative legacy: gift of a specific sum of money paid out of a particular fund



Main Body

- Dispositive provisions
 - Residuary clause
 - Distributes the rest of the estate not gifted
 - E.g., gift is void, gift is revoked, gift lapses
 - Without a residuary clause, failed gift would pass according to the law of intestacy

Main Body

- Miscellaneous clauses
 - Community property
 - Disinheritance
 - Not allowed for spouses
 - No contest
 - In terrorem: a provision discouraging a will contest from a beneficiary
 - Incorporation by reference: refer to another existing document



Fiduciary and Tax Provisions

- Personal representative
 - Executor or executrix of the estate
 - Person named as a fiduciary or trusted individual charged with following the instructions of the testator
 - Bond/surety
 - Used to protect estate from wrongdoing of the personal representative; like an insurance policy

Fiduciary and Tax Provisions

- Guardian
 - Guardian of person
 - Custody of child
 - Guardian of property
 - Care for property of child until child becomes adult
- Trustee
 - Testamentary trust: when will contains a trust, it is called a testamentary trust



Ending Paragraphs

- Testimonium Clause
 - Closing paragraph before signature
- Attestation Clause
 - Clause following testator's signature and precedes the witness signatures
- Self-Proof Clause
 - Statutory provision that allows the will to be self-proven and avoid the appearance of witnesses at time of probate

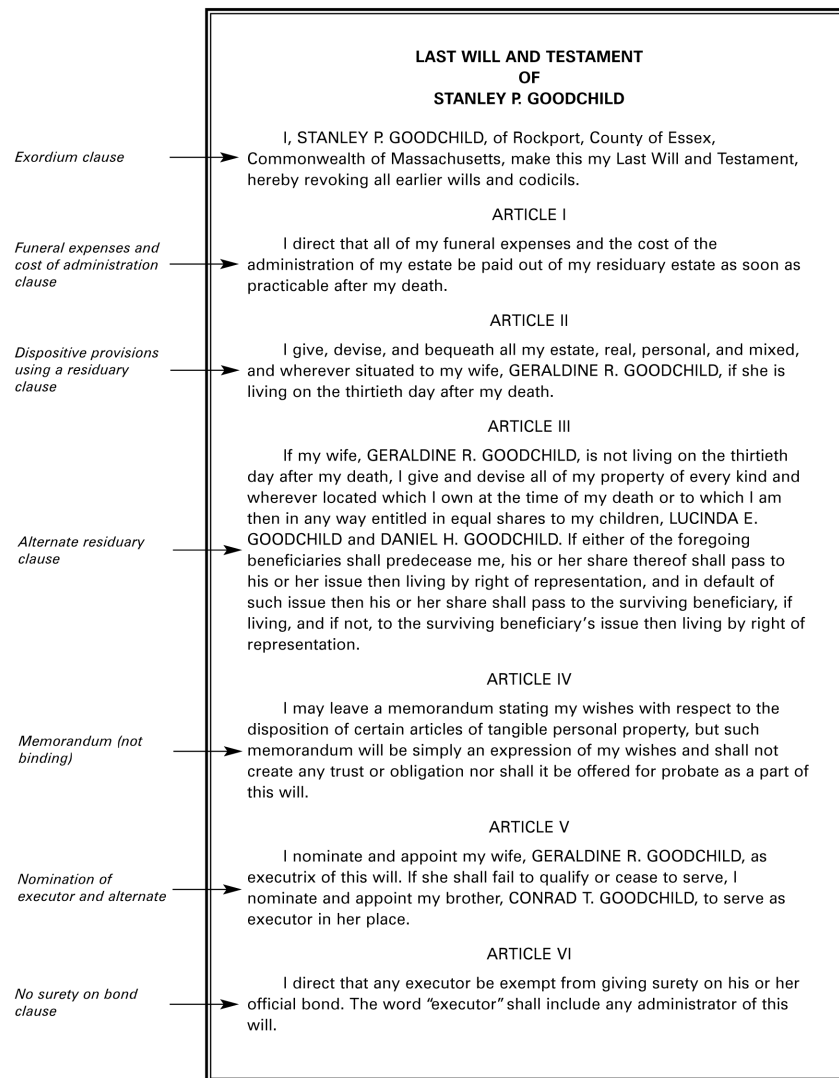


FIGURE 6-1 Sample Will with Clauses Defined

Administration of WILLS, TRUSTS *and* ESTATES

FIFTH EDITION

Gordon Brown
Scott Myers

*Appointment of
guardian and alternate
no surety on bond
clause*

ARTICLE VII

I appoint my wife, GERALDINE R. GOODCHILD, as guardian of the person and property of my minor children. If for any reason she shall fail to qualify or cease to serve, I appoint my sister, MAUREEN N. LANDERS, to serve as guardian in her place. No guardian appointed in this will or any codicil need furnish any surety on any official bond.

Powers of executor

ARTICLE VIII

My executor shall have full power of management and authority to sell, either at public or private sale, or to exchange, lease, pledge, or mortgage, in such manner and on such terms as such executor deems advisable, any or all property, real or personal, in my estate and to execute all deeds, assignments, mortgages, leases, or other instruments necessary or proper for these purposes; to compromise claims in favor of or against my estate on such terms as such executor deems advisable; to retain any securities or other property owned by me at the time of my death, although the same may not be considered a proper investment; to make distribution of property in kind, and for such purposes to determine the value of such property; and generally to do any and all such acts and things and execute any and all such written instruments with respect to such property as if the absolute owner thereof.

*Testimonium clause
with self-proof affidavit*

I, the undersigned testator, do hereby declare that I sign and execute this instrument as my last will, that I sign it willingly in the presence of each of said witnesses, and that I execute it as my free and voluntary act for the purposes herein expressed, this 2nd day of January, 2002.

Stanley P. Goodchild

*Attestation clause with
self-proof affidavit*

We, the undersigned witnesses, each do hereby declare in the presence of the aforesaid testator that the testator signed and executed this instrument as his last will in the presence of each of us, that he signed it willingly, that each of us hereby signs this will as witness in the presence of the testator, and that to the best of our knowledge the testator is eighteen (18) years of age or over, of sound mind, and under no constraint or undue influence.

(Witness)

(Address)

(Witness)

(Address)

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF ESSEX

*Self-proof affidavits
sworn to before notary
public*

Subscribed, sworn to, and acknowledged before me by the said testator and witnesses this 2nd day of January, 2002.

Notary Public
My commission expires:

FIGURE 6-1 (continued)

Rights of Other Heirs

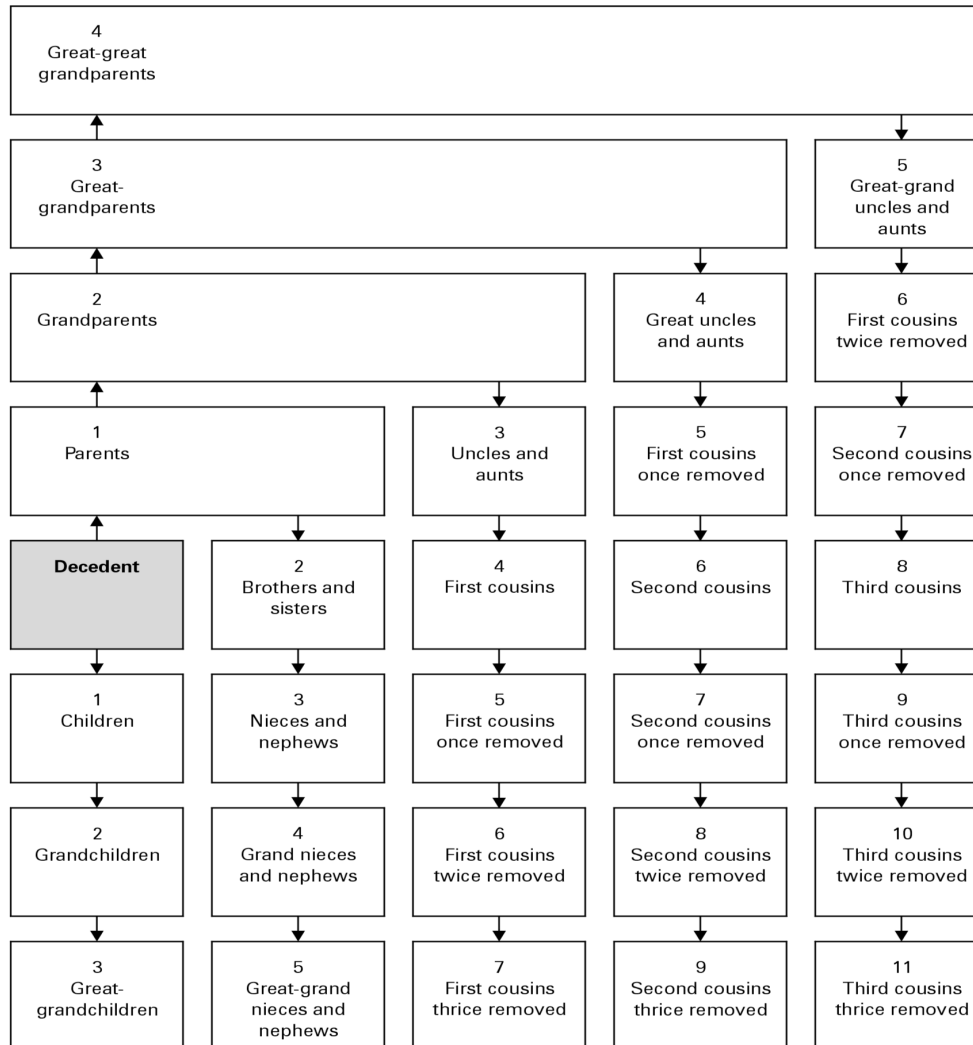


EXHIBIT 4-2 Degrees of Kindred