

Definitions

Decedent	Someone who has died
Will	Legal document used to dispose of the decedent's property
Testate	Decedent dies with a will
Intestate	Decedent dies without a will
Codicil	Supplement that either amends or revokes a decedent's will in whole or in part
Probate	Judicial process for administering and settling decedent's estates
Intestate Succession	Default estate plan for distributing property

People

Heirs	Individuals entitled to receive property by intestate succession
Spouse	Decedent's marital partner
Issue/Descendants	Decedent's lineal line
Ancestors	Decedent's parental line
Collaterals	Decedent's relatives through an ancestor

Intestacy

Intent	irrelevant- follow legislatures guide
heirs	entitled to take an intestate share
survival	key factor in taking from the decedent
Simultaneous death	Uniform Probate Code (UPC)- an heir must be proven by clear and convincing evidence to have survived the decedent by 120 hours
Without Heirs	Property will escheat to the state

Spouse's Share

who qualifies?	Legally married partner
Spouse + Shared Descendants	surviving spouse takes the entirety
Spouse + parent	Surviving spouse takes \$300,000 and 75% of remainder of estate
Spouse+ shared descendants+ Spouse's kids	Surviving spouse takes \$225,000 and 50% of remainder of estate
Spouse + non-spousal kids	Surviving spouse takes \$150,000 and 50% of remainder of estate
Just spouse	Surviving spouse takes the entire estate

Issue

Lineal line	must be a parent-child relationship
Adoptive children	inherit from decedent just like biological children
Stepparent adoption	Will not prevent adoptee from inheriting from other genetic parent
Posthumously Born children	If child is born 280 (or 300 under UPA) days of husband's death, there is a rebuttable presumption that the child is husband's and will inherit from the husband

Calculating Issue's Share

Per Stirpes	Divide shares into the total number of children who survive or leave issue who survive and then divide by representation
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Calculating Issue's Share (cont)

Per capita by representation	Divide property equally at the first generation where a member survives decedent; If a deceased member of a generation is not survived by living issue, then that member does not take a share
Per capita at each generation (UPC)	Divide property into equal shares at the first generation where there is a surviving member; pools the remainder share after each generation and divide equally

Execution of Wills

Three Formal Will Requirements	signed writing, witnesses, and testamentary intent
Signed Writing	must be written, signed at end or anywhere under UPC- must show intended to be signature; nothing after signature will be valid; doesn't need to be formal signature
Capacity	must be at least 18 years of age and of sound mind at the time of signing
Witness (Attestation)	majority- presence of witnesses and testator; UPC- witnesses must sign within a reasonable time of original signature by testator
"in the presence"	Traditional- line of sight; Modern approach- conscious presence



Execution of Wills (cont)

Interested witness Has a direct financial interest in the will- common law (not competent witness), UPC (abolished doctrine), and Purge theory

Purge theory Interested witness does not affect the validity of a will BUT probate court will purge any gain in excess of what the witness would take under intestate succession

Present Testamentary Intent must have the present intent

Failure to Satisfy Formalities Common law/ majority- strive compliance; UPC- substantial compliance by clear and convincing evidence

Holographic Wills

informal handwritten will

requirements must be signed but doesn't need witnesses

How much writing? some jurisdiction- anything not in handwriting will invalidate will; UPC- only requires material provisions be in handwriting

Intent look for words or phrases suggesting intent; UPC authorizes looking to extrinsic evidence

Codicils

Supplement Does not replace an underlying will

Formalities executed with the same formalities as a will

Will Substitutes

Joint tenancy Avoids probate because it has a right of survivorship

Revocable Trust Avoids probate because it has an inter vivos transfer

Pour-Over Will Avoids probate because it distributes property under a trust

POD Contract Avoids probate because it distributes by inter vivos transfer

Deed Avoids probate because it is an inter vivos transfer

Revocation of a Will

Ambulatory altered or revoked any time until the testator's death; can be revoked in whole or in part

Subsequent Instrument express revocation; implied revocation/ inconsistency

Physical act intent for physical act to revoke will; majority- particular language must be destroyed; UPC- destructive act affect some part of the will

Lost will creates a rebuttable presumption that the testator revoked the will by physical act; burden on proponent to show will's existence by clear and convincing evidence

Operation of Law divorce revokes all will provisions in favor of former spouse (UPC extends to ex's relatives); subsequent marriage does not revoke a will because of elective shares

Third Party Revocation

Third party can revoke on behalf of testator if at testator's direction and in testator's conscious presence

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Revoking Codicils

by revoking a will testator also revokes any codicil attached to the will; revoking a codicil does not revoke the will

Revival

Republication UPC/ majority does not recognize automatic revival of a revoked will

Dependent Relative Revocation (DRR) Safe valve for testators who revoke a will on the basis of mistake (of law or fact); invalidates the mistaken revocation and revives the earlier revoked will

Construction/ Interpretation

Plain Meaning assume the testator meant the plain meaning of what he said

Incorporation by Reference Will refers to document outside will can incorporate if: document exists at time of execution, testator intends incorporation, document described with sufficient certainty



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Construction/ Interpretation (cont)

Acts of Independent Significance	Testator can dispose of property based on some act or event that is unrelated to the execution of the will
Lapse	Common law: testamentary gift would lapse if intended beneficiary did not survive the testator; failed gift dumped into the residuary gift

Anti-lapse	Prevents certain gifts from lapsing. Requires protected relationship, survived by issue,
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Exception to lapsed gifts rule	Class gifts- if member's gift lapses, the rest of the class share that member's gift unless anti-lapse controls
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Abatement	If the estate does not have sufficient funds to pay debts or make gifts, the gifts will be abated, or reduced, in a specific order.
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Abatement hierarchy	intestate property, residuary gift, general gifts, special gifts
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Ademption by Extinction	specific piece of property no longer in estate. Traditional- devise is extinct; UPC- look at testator's intent at time she disposed of property (preference for replacement property)
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Construction/ Interpretation (cont)

Ademption by Satisfaction	testator satisfies a specific or demonstrative gift by inter vivos transfer. Testator must intend for gift to adeem and must be supported by writing
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Ambiguities	traditional- can only use extrinsic evidence to resolve latent (not on face) ambiguities; modern rule- both can use extrinsic evidence
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Mistakes	Courts are less forgiving when it comes to mistakes
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Power to Transfer

Rights of Surviving Spouse	elective share (forced share- 50% under UPC); waiver to elective share must be in writing after fair disclosure and with representation
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Gifts to Children- Advancements	lifetime gift that satisfies child's intestate share. Common law- lifetime gift is presumed to be advancement; UPC- only advancement if contemporaneous writing or writing that gift should be taken into account in computing division of estate
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Power to Transfer (cont)

Calculating effect of advancement: "Hotchpot" analysis	Add the value of the advancements back into the intestate estate, Divide the resulting estate by the number of children taking, Deduct the child's advancement from the child's intestate share.
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Omitted Children	intentional disinheritance; unintentional- takes intestate share or portion from what is devised to children
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Slayer Rule	A beneficiary who murders the decedent is barred from taking under the decedent's will; UPC allows killer's issue to take when relevant
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Disclaimer	signed writing that is filed with court OR declared to estate distributor AND Identify the decedent, describe the interest being disclaimed; within 9 months of decedent's death
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Elder Abuse	Someone who is convicted of financial exploitation, abuse, or neglect of a person under her care is prohibited from inheriting from that person.
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Will Contests

standing	only an interested party
time for filing	6 months after will is admitted to probate
Testamentary capacity	burden on contestor to show that when will was executed, testator lacked the ability to know: nature of act, nature and character of property, natural objects of bounty, plan of attempted disposition
Insane Delusion	testator has general capacity but has an insane delusion as to some belief. Measure against actions of a rational person (also need to prove but-for causation)
Undue Influence	contestant bears burden of showing: beneficiary received a substantial relationship, beneficiary had a confidential relationship with testator, and testator had weakened intellect. THEN burden shift to proponent to show no undue influence by preponderance of the evidence
Fraud	contestant bears burden of showing beneficiary made misrepresentation with the intent to deceive the testator and the purpose of influencing the testamentary disposition. Remedied by constructive trust

Will Contests (cont)

Forfeiture Clauses	in terrorem: no-contest clause designed to dissuade a beneficiary from suing about his share; under UPC clause is unenforceable if probable cause to challenge
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Probate Process

classify	each piece of property is probate or non-probate
probate	passes by will or intestate succession
non-probate	property is transferred by another document
Primary purpose	Orderly administration of a decedent's estate
Filing under UPC	Probate proceedings must be brought within _____ - _____ years of death, after which there is a presumption of intestacy. Can choose informal or formal probate
Creditors	Non-claim statutes: bar claims after time; must be given notice by personal representative
Personal Representative	person who acts on behalf of estate during probate process (administrator if by court or executor if by will)

Probate Process (cont)

Duties of Personal Representative	inventory and appraise estate, contact interested parties, satisfy debts, close the estate
Duties owed by personal representative	loyalty and care
Choosing a personal representative	surviving spouse who is devisee, other surviving devisee, surviving spouse, other heirs, any creditor (45 days after decedent's death)
Power of Appointment	Ability of decedent to select an individual to dispose of certain property under the will. General- no conditions; special-donor limits donee's power
Powers of Attorney	An authority to act on another's behalf in a legal or business matter. Must be in writing, signed, and dated. Types: General, special, Advanced healthcare directive (living will or durable power of attorney for healthcare)



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