

WILLS & TRUSTS

REFER TO THE STATUTES OF EACH JURISDICTION TO DETERMINE THE APPLICATION OF THE UNIFORM PROBATE CODE.

WILL:

WRITTEN OR ORAL EXPRESSION OF INTENTION
REGARDING DISPOSITION OF PROPERTY AT DEATH

TYPES OF WILLS

- A. ATTESTED WILL: SIGNED BY WITNESSES AND EXECUTED WITH CERTAIN FORMALITIES AS PRESCRIBED BY STATE LAW**
- B. HOLOGRAPHIC WILL: ENTIRELY IN TESTATOR'S HANDWRITING AND HAS NO ATTESTING WITNESSES**
 1. Recognized as valid in approximately 23 jurisdictions under different circumstances.
- C. NUNCUPATIVE WILL: ORAL**
 1. Generally only for disposition of personal property in contemplation of immediate death.
- D. LIVING WILL (NOT AN INSTRUMENT EFFECTIVE FOR DISPOSITION AFTER DEATH)**
 1. Instruction to physician to withhold life-sustaining procedures in event of terminal illness.

EXECUTION

A. TESTATOR

1. For Will to be valid (admissible to Probate), Testator (person who executes Will) must meet formal execution requirements of a particular jurisdiction.
2. In writing.
3. Signed by Testator.
 - a. May be signed by another at Testator's direction and in Testator's presence.
 - b. Executed as logical and
 - i. Rebuttable Presumption that material found after signature was added after execution and, therefore, fails to make conveyance.
4. Some states, Testator must "publish" Will—declare to witnesses what they are signing.
5. For a Will to be valid, Testator must intend for instrument to operate as Will.

B. WITNESSES

1. Signed in presence of and attested to by two witnesses (Majority); jurisdictional differences as to number of witnesses (some require three).
2. Signing/witnessing must be contemporaneous contemporaneous act.
3. **Continuous Presence Test (Majority)**
 - a. Each witness conscious of Testator and other witnesses' signing, within general awareness and cognizance of other parties.
4. **Scope of Vision Test (Minority)**
 - a. Witnesses are present if could have seen signing if they looked.

C. AGE AND COMPETENCY

1. Testator: Must be at least 18 years at time of execution, and sound mind.
2. Witnesses: Must be competent—mature and of sufficient mental capacity to understand act.

D. CODICIL

1. Must be executed with same formalities as a Will.
2. Supplement to a Will that alters, amends or modifies it.

CONSTRUCTION

A. CLASSIFICATION OF DEVISES

1. **Specific:** Gift of identifiable property (i.e. My Rolls Royce).
2. **Demonstrative:** Gift to be taken out of identifiable source (i.e. Bank Account, Stocks).
3. **General:** Gift payable from general assets of Estate.
4. **Residuary:** Remainder of Estate after gifts, taxes and other expenses are paid.

B. ABATEMENT: ORDER IN WHICH GIFTS ARE SACRIFICED TO SATISFY DEBTS, TAXES AND OTHER EXPENSES IF NOT ENOUGH ASSETS IN ESTATE

1. General Rule of Order (unless specified in Will)
 - a. Residuary
 - b. General (goes first to Beneficiaries)
 - c. Demonstrative
 - d. Specific

2. Some states provide that personal property shares within each category before real property.

C. ADEMPITION: BEQUEST FAILS IF SPECIFIC PROPERTY IS NOT IN ESTATE OR SUBSTANTIALLY CHANGED AT TESTATOR'S DEATH

1. **By Extinction:** Specific Devise no longer in Estate or substantially changed.
2. **By Satisfaction:** Beneficiary has received Testamentary gift during life of Testator.
3. Statutory provisions in some states alter ademption rules.

D. LAPSE

1. Beneficiary predeceases Testator and gift fails.
 - a. Failed gift passes under Residuary portion.
2. **Anti-lapse Statutes:** Save gift if:
 - a. Beneficiary was descendant of Testator (majority), and
 - b. Descendants of Beneficiary survived Testator.
3. Only applies if Will does not provide otherwise.

E. EXTRINSIC MATTERS

1. Incorporation by Reference.
 - a. Written document (i.e., list devising personal property) referred to in Will; document must be in existence at time of execution, language must sufficiently describe writing and manifest intent to incorporate the document.
 - b. Exception: List disposing of tangible personal property may be prepared anytime.
2. **Ambiguities**
 - a. Courts interpret Wills; extrinsic evidence admissible to clarify language in Will susceptible to differing interpretations.
 - b. If no evidence of Testator's intent, rules of construction and statutory presumptions applied.

REVOCATION

A. GENERAL: A PERSON WITH TESTAMENTARY CAPACITY MAY REVOKE WILL AT ANY TIME PRIOR TO DEATH

1. **By subsequent instrument:** Executed with same formalities as per jurisdiction, and intent to revoke.
 - a. **By instrumentary:** Last in time properly executed document revokes first as to any inconsistencies between two.
2. **By physical act:** Burning, tearing, cutting, destroying, mutilating, canceling, obliterating, wiping with intent.
3. **By operation of law:** Some states may be revoked by event of divorce, subsequent marriage, birth or adoption of children.
 - a. Majority view: Marriage following execution of Will has no effect on earlier Will—new spouse is pretermitted and can be protected by state's elective share statute.
 - b. Majority view: Divorce will revoke any conveyance to former spouse, and any appointment as personal representative; remainder of Will valid.
 - c. Only divorce relevant in Testator, not those named in instrument.
 - d. Majority view: Children not provided for in Will can claim under pretermitted child statute in that jurisdiction.

B. COMMON LAW: REBUTTABLE PRESUMPTIONS OF REVOCATION

1. Will not found after death.
2. Will found mutilated.
3. Extrinsic evidence admissible to show Testator's intent.

C. PARTIAL REVOCATION

1. Majority view: By physical act.
 - a. Drawing lines through bequest.
 - b. Remainder of Will admitted to Probate.
2. In jurisdictions where not permitted, entire original Will admitted to Probate.
 - a. Revocation of Codicil does not revoke Will.
 - b. Pretermitted Testator intended Will as originally executed.

D. REVALIDATION

1. Republication by Codicil.

- a. Properly executed with formalities.
2. Revoked by revocation of revoking (subsequent) Will (Majority).
3. **Dependent Relative Revocation**
 - a. Equity doctrine that presumes that Testator's intent to revoke was conditional upon another disposition of property being valid.

INTESTACY

A. NO VALID WILL AT DEATH—STATUTES OF JURISDICTION DISTRIBUTE ASSETS

1. Statutes provide for orderly distribution of Estate.
 - a. Generally:
 - i. Spouse.
 - ii. Children (and descendants of deceased children).
 - iii. Parents.
 - iv. Siblings.
 - b. Consanguinity (Blood Relationship) to those receiving—generally, blood descendants of grandparents.

B. SURVIVING SPOUSE

1. Majority—Elective Share—generally $\frac{1}{2}$.
2. Community Property (Minority): Husband and Wife treated as co-owners—survivor takes $\frac{1}{2}$ of Estate.
 - a. Separate property excluded from Estate.
3. Some states give specific dollar amount plus $\frac{1}{3}$ or $\frac{1}{2}$.
4. If no descendants, majority view gives spouse entire Estate.
 - a. Some states (UPC)—if decedent is survived by descendants who are also all descendants of surviving spouse, spouse takes entire Estate.

C. DIVISION OF ESTATE

1. **Lineal Descendants**
 - a. Per Capita with Representation (per stirpes)—Divided equally at first generational level where taken are living, descendants take share deceased takes; parent would have received.
 - b. Per Capita at General Level (Modern Tendency)—Divided equally at first generational level where taken are living, remaining shares combined and redivided equally at next generational level with living takers.
2. **If no spouse or descendants**
 - a. Majority view to decedent's parents.
 - b. If no parents, descendants of Testator's parents (brothers or sisters).
 - c. If no brothers or sisters, to decedent's maternal and paternal grandparents.
 - d. If none of above, to nearest kin on each side of family.
 - e. If none of above, entire property passes to State.
3. **Half-Blood:** Majority view has abolished distinction.
4. **Illegitimacy**
 - a. Inherits from mother and not from father (Majority).
 - b. May inherit from father if legitimized through marriage, or paternity acknowledged or adjudicated.
5. **Adoption**
 - a. Treated same as natural child of adoptive parents.
 - b. Inheritance rights terminated as to Natural Parents (exceptions for adoption by spouse of natural parent).

PROBATE & ADMINISTRATION

A. PURPOSE

1. Orderly transfer of assets.
2. Protect creditors.
3. Identify executors.

B. PROCEDURE FOR PROBATE (AS PRESCRIBED BY STATE STATUTE)

1. Filing—Petition court to admit Will to Probate.
2. Notice
 - a. Service to known creditors.
 - b. Publication to unknown interested parties.
3. Hearing—includes proof of death and authenticity of Will, compliance with jurisdiction requirements, and capacity of Decedent.

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