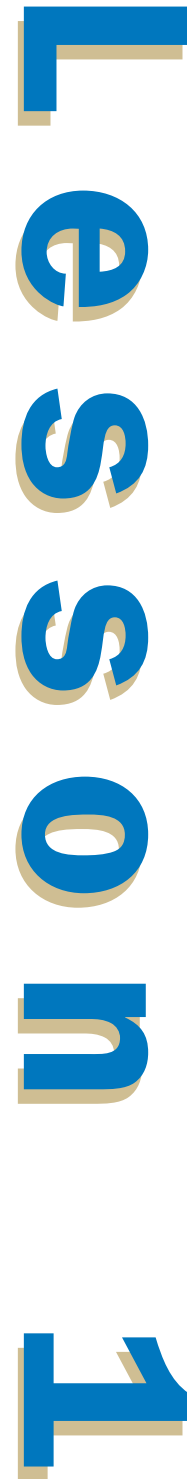


# ***The Concepts of Wills and Property; The Probate Court***

Your first lesson includes two assignments that cover the first four chapters of your textbook. These chapters will provide you with an overview of the terminology, principles, and laws related to wills, trusts, and estate administration.

When you complete this lesson, you'll be able to

- Identify the advantages and disadvantages of a will
- Begin to identify and become familiar with the basic terminology of wills and trusts
- Recognize and understand the terminology and concepts associated with property law
- Explain the kinds, methods of creation, and characteristics of estates in real property
- Identify and explain the basic functions of the participants essential for drafting wills and trusts and for administering the estate of a decedent
- Identify the proper court that supervises the administration and distribution of a decedent's estate
- Determine the proper place (county/state) to commence probate proceedings of a decedent's estate
- Recognize, understand, and explain the basic terms and concepts, including the difference between orthodox (traditional) and UPC terminology associated with testacy and intestacy
- Recognize and identify lineal and collateral relationships and determine who is entitled to receive a decedent's property under state intestate succession statutes



# ASSIGNMENT 1

Read in your textbook, *Wills, Trusts, and Estate Administration for the Paralegal*, pages 1–68, starting with the heading “The Purpose and Need for a Will.” Then read Assignment 1 in this study guide.

## Terminology and Concepts

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Where would the legal community be without its “legalese”? Though recent years have seen a decline in the more extreme uses of this almost foreign language, you can’t escape having to learn some of the basics if you’re going to work in the legal profession. It’s very important when dealing with legal matters to say *exactly* what you mean to avoid any confusion or ambiguity. Knowing the correct terminology and the proper way to use it is paramount. Chapter 1 provides you with a preliminary introduction to many of the key terms and concepts that you’ll need to know in regard to wills, trusts, and estate administration.

Let’s start, as your text does, with the definition of a *will*: the written declaration of a person’s intended distribution of property after death. Well, that sounds simple. Why would a person need to enlist the services of an attorney’s office with something that sounds so simple? Because rarely is anything as simple as it seems. A person trying to create a will without the assistance of someone who knows the law is risking the will’s being found invalid by the probate court, and then the property will be distributed as if he or she had never written a will (had died intestate).

The initial hurdles that the writer of a will (*testator/testatrix*) must clear are the requirements set forth by state statutes defining a “valid” will. First, the testator must be legally *able* to make a will by meeting the state’s legal capacity (age) and testamentary capacity (sanity) requirements. Second, the *document* must meet state statutory requirements; for example, most states require that the will be written, signed, and dated by the maker and attested and signed by two or more witnesses. State statutes may vary on such issues as where the testator’s signature is located, how many witnesses there are, and whether the document is typed or handwritten (*holographic*).

Most people may not be aware of the many other functions a will can serve in addition to “I give my entire compact disc collection to my sister Sally.” Throughout Chapter 1, your text introduces you to some of these other functions. For example, a testator can set forth the source from which he wants the death taxes (federal and state estate taxes and state inheritance taxes) to be paid with an “apportionment clause.” Or again the testatrix may have minor children for whom a guardian will need to be appointed. Rather than leaving it to the probate court to choose someone, the testator can set forth her choice in her will (note the exception to this on page 14 of your textbook). Also, through a will, a person can name the executor of his or her estate—that is, the personal representative who manages, administers, and distributes the estate according to the terms of the will. Again, if the testator or testatrix doesn’t choose an executor in the will, then the probate court will choose one. An individual can even use a will to set up a trust that becomes operational after his or her death (*testamentary trust*).

An individual just “writing a will” may not be aware of the advantages of creating a “letter of instructions.” There are many potential uses for such a document—for example, to set forth instructions for organ donation and funeral and burial plans, or as an all-inclusive checklist that identifies the testator’s personal and family history. And, an individual preparing a will without the assistance of a legal professional may not realize that there are alternatives to a will that he or she can employ to distribute an estate. Some examples of these set forth in your text are: joint tenancy, life insurance, *inter vivos* (living trust), *inter vivos* gift, and Washington state’s community property agreement.

Even though as a paralegal you can’t *advise* a client regarding what to do, you’ll most likely be the first person he or she will have contact with. You’ll need to know what questions to ask and what information to obtain from the client so your supervising attorney can accurately evaluate the client’s situation and best advise regarding his or her will, trust, and estate administration needs.

Be sure to take notes in your log on the four “Ethical Issues” features in Chapter 1.

## Law of Property

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Wills, trusts, and estate administration all deal with managing and disposing of property (real and personal). Without property, there's no need for a will. Without property, a trust can't be created. Without property, there's no estate to administer. Chapter 2 introduces you to the terminology and concepts of property law and explains its association with wills, trusts, and estate administration. If you haven't already done so, now would be a good time to find access to your state's statutes. Most of the terms and concepts that we're about to discuss are set forth and defined within each state's statutes and can vary greatly from state to state.

*Property*, anything subject to ownership, is classified as either real property or personal property. *Real property* is that which is immovable, fixed, or permanent, such as land, houses, apartment buildings, “fixtures,” or trees. *Personal property* is movable and can be tangible or intangible—cars, clothing, cash, stocks, furniture, copyrights, or trademarks (basically, any property that isn't real property). An estate is made up of both real property and personal property. Not all of a person's estate, however, is subject to distribution via a will or intestate succession. A person's “gross estate” consists of both “probate property” and “nonprobate property.”

*Probate property* is property in a decedent's estate that can be distributed through a will or by intestate succession. Some examples of probate property are real and personal property owned in *severalty* (single ownership) or in tenancy in common; debts owed to the decedent for promissory notes, loans, or rents; gain from the sale of a business; and Social Security benefits. Probate property is subject to a decedent's creditors' claims and federal and state death taxes.

*Nonprobate property* is property in a decedent's estate that can't be distributed through a will or by intestate succession. Some examples of nonprobate property are: real and personal property owned in joint tenancy with right of survivorship, property in a living trust, and proceeds of a life insurance policy payable to a named beneficiary. Nonprobate property is *not* subject to claims of the decedent's creditors, but because it's part of the decedent's gross estate, it *is* subject to federal and state estate taxes and state inheritance tax.

Now that you have an idea of the different types and classifications of property, let's move on to the various forms of property ownership. Real and personal property can be owned by one person or by two or more persons. Individual ownership is called *tenancy in severalty*. Ownership by two or more persons is called *concurrent ownership*. The types of concurrent ownership discussed in your text are joint tenancy, tenancy in common, tenancy by the entirety, and community property. Exhibit 2.6 on page 56 of your text describes these forms of concurrent ownership and their varying characteristics. The type of ownership a person has of a piece of property affects what the person is statutorily allowed to “do” with that property.

An owner in severalty has absolute ownership of the property. He or she can dispose of the property while living by gift or sale, or after death by making a will. If he or she hasn't disposed of this property at the time of death, it remains in the estate and passes via intestate succession statutes.

A person owning property in *joint tenancy* can convey his or her ownership interest while living by gift or sale (note: the new tenant becomes a tenant in common, not a joint tenant). However, he or she can't dispose of this property through a will, nor will it pass via intestate succession. This is due to the characteristic of the *right of survivorship*, which both joint tenancy and tenancy by the entirety have. The right of survivorship causes a person's joint tenancy ownership interest in property to pass to the remaining joint tenants at the time of his or her death. This happens as an operation of law, so there's no need for probate. Though this aspect may seem appealing—avoiding probate—there are also disadvantages to joint tenancy (see pages 43–44 of your text for a list of the advantages and disadvantages). The requirements for the creation of a joint tenancy and *tenancy by the entirety* are dictated by state statutes. Research your state statutes to find what's needed to create these types of ownership in your state.

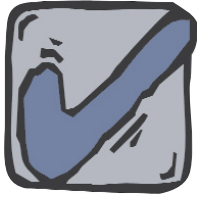
*Tenancy in common* is similar to a joint tenancy, but it doesn't have the characteristic of the right of survivorship. A tenant in common can convey an ownership interest in the property while living by gift or sale, or can dispose of it through a will. If he or she hasn't disposed of this interest at

the time of death, it remains in the estate and passes via intestate succession statutes. Again, research your state statutes to find what's needed to create this type of ownership in your state.

*Community property* is one of two types of marital property law systems in the United States (the other is common law). Is your state a community property state or common law state? Under community property law, each spouse owns one-half of the community property (different from “separate property”) and retains that one-half ownership upon the death of a spouse. The decedent can dispose of this one-half in his or her will. States vary on the division and distribution of the decedent's one-half when there's no will.

Be sure to make notes in your log on the three “Ethical Issues” features in Chapter 2.

**Before proceeding to the next assignment, take a moment to complete *Self-Check 1*. Then check your answers by turning to the back of this study guide.**



# Self-Check 1

Throughout *Wills and Estates*, you'll be asked to check your understanding of what you've just read by completing a "Self-Check." Writing the answers to these questions will help you review what you've learned so far. If you've missed any answers, or you feel unsure of the material, review your textbook and this study guide until you feel that you understand the information presented. Please complete *Self-Check 1* now.

1. A personal representative named in a will is called a/an \_\_\_\_\_. A personal representative appointed by the probate court when there's no will is called a/an \_\_\_\_\_.
2. *True or False?* If a decedent has executed a will, it's possible for his estate to be disposed of via intestate succession laws rather than via his will.
3. *True or False?* A letter of instructions is a legally enforceable part of a will.
4. *True or False?* An *inter vivos* trust can be created in a will.
5. Chattel is a type of \_\_\_\_\_ property. A fixture is a type of \_\_\_\_\_ property.
6. *True or False?* A fee simple estate can be transferred through a will.
7. The creation of a trust requires the separation of the \_\_\_\_\_ title and the \_\_\_\_\_ title.

**Check your answers with those on page 79.**

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