

# WILLS & TRUSTS

## FREEDOM & POWER TO TRANSFER PROPERTY AT DEATH

To the extent that the Constitution protects property transfers at death, protections arguably apply only to the decedent's power to dispose of property.

- **Dead hand control:** Decedent can make a conditional testamentary gift to beneficiary ("beware") (i.e., beware gets gift upon meeting condition). This is typical in "incentive trust" and valid unless it violates public policy or judicial enforcement of condition would constitute state action in violation of the Constitution.

### 1. Conditions invalid for violation of public policy:

- Absolute restraint on marriage** (partial restraint on marriage that imposes only reasonable restriction(s) is valid (e.g., requirement to marry within a reasonable time period or to someone of a particular religious background)).
- Requirement to remain faithful to particular religion.**
- Encouraging separation and/or divorce** (gift in event of divorce/separation is valid; controlling factor is decedent's dominant intent, which is to provide support in that event, not to encourage it).
- Preventing family strife.**
- Directing destruction of property.**

### 2. Remedies for conditions that violate public policy:

- Gift-over clause:** Directs disposition of gift if condition is not satisfied.
  - No gift-over clause:** Condition is stricken and beware receives gift.
3. The Restatement (Third) of Trusts arguably expands power of courts to limit testamentary freedom; authorizes invalidation of conditions that are "unnecessarily punitive" or "unreasonably intrusive" (see §299).

### • Limitations on testamentary power to transfer:

- Under a separate property system, each spouse owns his/her earnings acquired during marriage. Upon death of spouse, the surviving spouse is entitled to share of deceased spouse's property, regardless of the terms of the deceased spouse's will; how much of which property varies with jurisdiction.

- Traditional/Common law:** Surviving spouse is entitled to share of deceased spouse's probate estate.
- Modern trends:** Surviving spouse is also entitled to share of deceased spouse's augmented estate (some nonprobate estate assets which vary by jurisdiction).
- UPC adopts the partnership model of marriage;** employs three-step process to ensure surviving spouse receives half of marital property:
  - First:** Combine both spouses' total assets and calculate the percentage of the total that is marital property (based on length of marriage).
  - Second:** Determine how much of the marital property the surviving spouse will end up with after distribution of deceased's probate and nonprobate property.
  - Third:** If latter total is not half the marital property, surviving spouse has elective share claim for the difference.

- Under community property system, earnings acquired by either spouse during marriage are owned equally by spouses. Each spouse owns an undivided half of the interest in every community property asset. Upon the death of a spouse, the surviving spouse owns half of the interest in every community property asset outright. The deceased spouse's half interest in every community property asset goes into probate, where it can be devised to anyone.

- Omitted spouse:** Individual executes a valid will, marries, and dies without revoking or revising the will. The presumption is that the testator did not intend to disinherit spouse; presumption is rebuttable if will expressly indicates otherwise, testator provided for spouse outside of will and intended for that transfer to be in lieu of taking under will, or spouse waived right to claim share.

- Omitted child:** Individual executes a valid will, has child, and dies without revoking or revising will. The presumption is that the testator did not intend to disinherit child or the individual mistakenly thought the child was dead; presumption is rebuttable if will expressly indicates otherwise, testator provided for child outside of will and intended for that transfer to be in lieu of taking under will, or testator had at least one child when executed will and devised substantially all of the estate to the parent of the omitted child.

- **Testamentary capacity:** Testator must have requisite capacity at the time of executing/revoking will. Testator must be at least 18 years old and of sound mind (ability to know (not actually know) nature and extent of property, natural objects of bounty, nature of testamentary act, and how all relate); can be lucid interval.

- **Standing to contest will:** Only party who will financially benefit if the challenge is successful has the standing to contest the validity of the will or a provision in the will.
- **Burden of proof:**

- Majority:** Once will proponent offers proof of duly executed will, there is rebuttable presumption of capacity.
- Minority:** Once will contestant introduces evidence of lack of capacity, will proponent bears the burden of proving testamentary capacity.

### Possible Defects in Capacity at Time of Will Execution & Possible Remedies

- **Insane delusion:** False sense of reality.

- Majority** applies "any factual basis test" (if there is any factual basis for belief, it is not insane delusion).
- Minority** applies "rational person test" (if a rational person in testator's situation could not have reached the same conclusion, it is insane delusion).
- Irrelevant** unless shown that belief caused testator to dispose of property in a way testator otherwise would not have:
  - Majority** applies "but for" causation (but for the insane delusion, the testator would not have disposed of property as he did. Some courts only require that insane delusion "materially affected" provisions in will).
  - Minority** only requires that insane delusion might have affected disposition of testator's property.

- **Undue influence or "substituted intent":** When one influences the testator to the extent that the will expresses influencer's intent. Circumstantial evidence; inferred if unavailability, opportunity, motive, and causation. Contestant bears the burden of proof; traditionally, most states required proof of a confidential relationship between testator and will proponent, proponent received bulk of estate, and decedent's intellect was weakened.

- Modern trend (Restatement (Third)):** Presumption of undue influence if confidential relationship between defendant and testator (fiduciary, sibling, and/or dominant subservient) and suspicious circumstances (relatively new and not widely adopted yet).
- A.** If contestant can prove elements, presumption of undue influence arises and burden of proof shifts to the defendant to rebut presumption (clear and convincing in some jurisdictions (minority award punitive damages); preponderance of evidence in others).

- **Duress:** Wrongdoer performs, or threatens to perform, a wrongful act that coerces donor into making a donative transfer he otherwise would not have made (e.g., undue influence with physical (or threatened) act); transfer is invalid.

- **Fraud:** When someone intentionally/recklessly misrepresents a material fact to testator with the intent of influencing (or knowledge that such influence would substantially likely result) and misrepresentation causes testator to dispose of property in a way that he would not have otherwise. Fraud also can occur when someone intentionally fails to disclose.

- Fraud in inducement:** When a person misrepresents a material fact to testator to induce execution of the will with a certain provision or revocation of the will.
- Fraud in execution:** When a person misrepresents the nature of the document that testator is signing (e.g., person is tricked into signing the will or testator realizes he is signing the will but the person misrepresents some of the content of will).

- **Remedies:** Court will strike as much of the will as was caused by the defect; if struck in whole, and there is no prior valid will, decedent dies intestate. Where there is fraudulent failure to revoke, will or clause is revoked. Where there is fraudulent failure to execute, court can impose constructive trust on parties who take decedent's probate property and order property distributed to the parties who would have taken the property had will been executed (i.e., gives effect to will decedent did not execute).

- **Tortious interference with an expectancy or "interference with inheritance":** Third party has intentionally committed tortious conduct in testamentary process against decedent. Those who would have taken, but for the misconduct, can sue the third party for tortious interference with an expectancy. Plaintiff typically has to prove existence of expectancy, reasonable certainty that it would have been realized, intentional interference, involvement of tortious conduct with interference, and damages. Plaintiff is eligible for punitive damages. If the will contains a "no contest"

## EXECUTION OF VALID WILL

- **Validity:** Depends on jurisdiction's statutory wills act (evolved from statute of frauds) and jurisdiction's position as to what degree of compliance with wills act is acceptable. Traditional attested (i.e., witnessed) will minimally includes signed and witnessed writing. Common law requires strict compliance with wills act; modern trend favors substantial compliance or harmless error.

- **Signature:** Can be any mark; if testator intends to sign full name and doesn't, partial signature does not qualify. Will can be signed by another as long as person signs

testator's name, in his presence, and at his express direction. In most jurisdictions, testator does not have to sign in front of witnesses as long as he acknowledges the signature already on the document as his own.

- **Witnesses:** Most jurisdictions require at least two witnesses present at same time; the assumption is that the witness assesses testator's capacity and execution ceremony and protects testator. Traditionally, witnesses must sign in the presence of testator ("line of sight" test). Testator can see or has the opportunity to see witnesses sign; witnesses

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**Sabine Zange**



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### **Table of Contents Paralegal Study Guide**

1. Understanding the eBook Paralegal Study Guide
  - The Rise of Digital Reading Paralegal Study Guide
  - Advantages of eBooks Over Traditional Books
2. Identifying Paralegal Study Guide
  - Exploring Different Genres
  - Considering Fiction vs. Non-Fiction
  - Determining Your Reading Goals
3. Choosing the Right eBook Platform
  - Popular eBook Platforms
  - Features to Look for in an Paralegal Study Guide
  - User-Friendly Interface
4. Exploring eBook Recommendations from Paralegal Study Guide

- Personalized Recommendations
- Paralegal Study Guide User Reviews and Ratings
- Paralegal Study Guide and Bestseller Lists
- 5. Accessing Paralegal Study Guide Free and Paid eBooks
  - Paralegal Study Guide Public Domain eBooks
  - Paralegal Study Guide eBook Subscription Services
  - Paralegal Study Guide Budget-Friendly Options
- 6. Navigating Paralegal Study Guide eBook Formats
  - ePub, PDF, MOBI, and More
  - Paralegal Study Guide Compatibility with Devices
  - Paralegal Study Guide Enhanced eBook Features
- 7. Enhancing Your Reading Experience
  - Adjustable Fonts and Text Sizes of Paralegal Study Guide
  - Highlighting and Note-Taking Paralegal Study Guide
  - Interactive Elements Paralegal Study Guide
- 8. Staying Engaged with Paralegal Study Guide
  - Joining Online Reading Communities
  - Participating in Virtual Book Clubs
  - Following Authors and Publishers Paralegal Study Guide
- 9. Balancing eBooks and Physical Books Paralegal Study Guide
  - Benefits of a Digital Library
  - Creating a Diverse Reading Collection Paralegal Study Guide
- 10. Overcoming Reading Challenges
  - Dealing with Digital Eye Strain
  - Minimizing Distractions
  - Managing Screen Time
- 11. Cultivating a Reading Routine Paralegal Study Guide
  - Setting Reading Goals Paralegal Study Guide
  - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Paralegal Study Guide

- Fact-Checking eBook Content of Paralegal Study Guide
  - Distinguishing Credible Sources
13. Promoting Lifelong Learning
- Utilizing eBooks for Skill Development
  - Exploring Educational eBooks
14. Embracing eBook Trends
- Integration of Multimedia Elements
  - Interactive and Gamified eBooks

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