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PRINCIPLES OF

# Wills, Trusts & Estates

SECOND EDITION

WILLIAM M. McGOVERN

SHELDON F. KURTZ

DAVID M. ENGLISH

WEST®

# **PRINCIPLES OF WILLS, TRUSTS AND ESTATES**

**Second Edition**

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## Preface

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This book is an abridged and slightly revised version of McGovern, Kurtz & English, *Wills, Trusts and Estates including Taxation and Future Interests* (4th edition 2010). A reader of this book who seeks additional information on any topic can turn to the larger version. This is easy because the section numbers in both versions are the same.

**PRINCIPLES  
OF  
WILLS, TRUSTS AND  
ESTATES**

**Second Edition**

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# Chapter 1

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## TERMINOLOGY AND CHOICE OF LAW

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### *Analysis*

#### **Sec.**

- 1.1 Terminology.
  - 1.2 Conflict of Laws.
  - 1.3 Change in the Law.
- 

### **§ 1.1 Terminology**

This section alphabetically lists terms which recur elsewhere in the book. A brief definition of the term is given with a reference to the section in the book where the term is more fully discussed.

#### *abatement*

The reduction of devises in a will in order to pay claims against the estate. The rules on abatement are discussed in Section 8.4.

#### *ademption*

The failure of specific devises by transfer or loss of the property after the will is executed. *See* Section 8.2. The word is also used for gifts made by a testator while still alive to a devisee designated in the will which are intended to replace, in whole or part, the devisee's right under the will. *See* Section 8.2 and Section 2.6 for the analogous rules for intestacy. When used in the former sense, the phrase "ademption by extinction" is sometimes used; when used in the latter sense, the phrase "ademption by satisfaction" is sometimes used.

#### *administrator*

Someone appointed to administer the estate of a decedent who either died intestate or whose will failed effectively to designate an

executor. An administrator who operates under a will is called an administrator “with will annexed.” Sometimes the Latin *cum testamento annexo* (or “c.t.a.”) is used.<sup>1</sup> The rules for choosing administrators are discussed in Section 12.6. Many states today use the phrase “personal representative” rather than administrator but this phrase is also defined to include an executor as well.<sup>2</sup>

*advancement*

A gift made by an individual who later dies intestate that is taken into account when computing the shares of the intestate’s heirs. *See* Section 2.6.

*ancillary administration*

Administration of assets outside the state where a decedent was domiciled at death. *See* Section 13.4.

*annuity*

A provision for periodic fixed payments (typically payable annually or monthly) to a person, usually for life, but sometimes for a stipulated fixed period. The trustee of a trust may be directed to pay an annuity to a person, although this is less common than a direction that the trustee pay all trust income to a person or persons or pay as much as the trustee deems appropriate out of the income or principal.

Annuities can also be created by a contract between a company and a person who buys an annuity, either for the benefit of the purchaser or of another. In this situation the annuity performs a function like life insurance; the company by promising to pay the agreed amount for the life of the annuitant assumes the risk that the annuitant will live so long that the aggregate annuity payments total more than the original cost of the annuity contract. Insurance proceeds are often paid out in the form of an annuity after the death of the insured.

*appointment*

As to the appointment of executors, administrators, and other fiduciaries, *see* Section 12.6. *See also* **power of appointment**.

*attest*

Bear witness, especially as to a will. *See* Section 4.3.

*attorney, attorney-in-fact*

*See* **power of attorney**.

§ 1.1

2. UPC § 1-201(35).

1. Cal.Prob.Code § 8440.

*bequeath, bequest*

A somewhat antiquated name for a gift of personal property in a will. It is the Anglo-Saxon equivalent to legacy, a word which is derived from Latin. *See* **devise**.

*bypass trust*

A trust created for the benefit of the spouse of a settlor or testator. The assets of the trust are excluded from the taxable or probate estate of the spouse. The trust typically provides that the spouse is entitled to all of the trust's income for life and may empower the spouse to appoint the property to others. *See* Section 15.4.

*cestui que trust (use)*

Obsolete term for trust beneficiary, derived from law french.<sup>3</sup>

*charity*

An entity organized and operated for religious, charitable, scientific, literary, or educational purposes.<sup>4</sup> Charitable trusts are trusts created for the benefit of charities and are subject to certain special rules, discussed in Section 9.10.

*child*

Many problems arise from this simple word. Does it include an adopted child? A step child? *See* Section 2.10. A child born as the result of assisted reproductive technologies? *See* Section 2.11. A child born out-of-wedlock—a so-called “nonmarital child”? *See* Section 2.9. A grandchild? *See* Section 10.1.

*civil law*

Used in this book in contradistinction to the common law of England and all of the United States outside Louisiana. *See* Sections 3.2, 13.2.

*class gifts*

A gift to a group, like “children,” as distinguished from a gift to individuals, like “John and Mary”. The consequence of something being a “class gift” can be important, and there is much case law defining the term in borderline situations, such as a gift “to my children, John and Mary.” Typically, class members are related to each other through a common ancestor. *See* Section 8.5.

*clear and convincing evidence*

A requirement of proof intermediate between a preponderance of the evidence, the ordinary rule in civil cases, and proof beyond a

3. “The beneficiary is described in law french as ‘cestui a qui use le feoffment fuit fait,’ and from this obtains his curious title ‘cestui que use.’” A.

Simpson, *An Introduction to the History of the Land Law* 163–64 (1961).

4. *See*, I.R.C. § 501(c)(3).

reasonable doubt, which is required to convict in criminal cases.<sup>5</sup> The phrase occurs frequently. For example, the Uniform Probate Code validates wills which fail to meet the formal requirements to be probated if there is “clear and convincing evidence” that the decedent intended the document to be a will.<sup>6</sup> What is *not* clear is (a) what effect this standard has on juries when it appears in an instruction,<sup>7</sup> and (b) in cases tried by the court, whether it is the trial court or the appellate court which must be satisfied that the evidence was clear and convincing.<sup>8</sup> Some courts regard uncorroborated testimony of an interested witness as not “clear and convincing,”<sup>9</sup> but there is no general rule to this effect.

#### *codicil*

A document used to modify a will. From the Latin *codicillus*.<sup>10</sup> Codicils are usually shorter than wills, but they are subject to the same formal requirements.<sup>11</sup> “Republication” by codicil is discussed in Section 6.2.

#### *collateral relatives*

Distinguished from ancestors and lineal descendants or issue, they are individuals related to a decedent through a common ancestor such as a parent or grandparent. The term includes brothers, sisters, nieces, nephews, cousins, etc. Derived from the Latin *latus*, meaning side. See Section 2.2.

#### *common trust fund*

A fund maintained by a professional trustee for investment of the assets of multiple trusts administered by the trustee in order to reduce costs and facilitate diversification of investments. See Section 12.2.

#### *community property*

The system of property ownership for spouses in eight American states and many foreign countries. It affects both intestate succession and the limitations on one spouse’s right to devise or give away property. Community property is discussed in Section 3.8.

5. First Nat’l. Bank v. King, 635 N.E.2d 755 (Ill.App.1994).

6. UPC § 2-503.

7. Compare In Matter of Estate of Bennett, 865 P.2d 1062 (Kan.App.1993) with Matter of Estate of Mitchell, 623 So.2d 274 (Miss.1993) judgment on a verdict was reversed because a jury had erroneously been instructed that a preponderance of the evidence was sufficient.

8. 2 McCormick, *Evidence* 340 (4th ed. 1992).

9. Ryan v. Ryan, 642 N.E.2d 1028 (Mass.1994).

10. The word had a somewhat different meaning in Latin, however. “Codicilli” were informal instruments which were sometimes used even without a will. W. Buckland & A. McNair, *Roman Law and Common Law* 12 (2d ed. 1965).

11. UPC § 1-201(57) (“‘will’ includes codicil”).

*confidential relationship*

This term is used in connection with a presumption that can arise when a will or gift is challenged on the basis of undue influence. *See* Section 7.3. It is also the basis for an exception to the requirement that trusts of land must be in writing. *See* Section 6.4.

*conservator*

Some persons accent the first syllable of the word, others the second. There is also inconsistency as to its meaning. Under the Uniform Probate Code, a conservator is a “person appointed by a court to manage the estate of a protected person.”<sup>12</sup> In other words, the conservator only deals with the conservatee’s property. A “protected person” may be either an adult who has been judged incompetent to handle property or a minor. This usage, however, is not universal. For example, in some states a protected person is called a “ward;”<sup>13</sup> in some states the person fulfilling the role of conservator may be referred to as the guardian of an estate.

Both guardians and conservators are fiduciaries, and many of the rules governing trustees also apply to them.<sup>14</sup> The differences between conservatorships (or guardianships) and trusts are discussed in Section 9.5.

*constructive trust*

A constructive trust arises as a judicial equitable remedy and usually is said to be imposed regardless of intent in order to prevent unjust enrichment, *e.g.*, on a thief, who obviously intends only to benefit himself.<sup>15</sup> However, constructive trusts are also imposed to carry out an intent which was informally expressed, as in oral trusts of land. *See* Sections 6.1, 6.4.

*contingent remainder*

A future interest that may not become possessory, as in a gift “to A for life, then to her children who survive her.” While A is alive, one cannot know whether or not she will have children who survive her. Contingent remainders are contrasted with “vested” remainders, *e.g.*, “To A for life, then to B.” Even though B cannot take possession while A is alive, B’s remainder is vested; if B dies before A, the property will be part of B’s estate. For further discussion, *see* Section 10.1. The Restatement (Third) of Property would discontinue the distinctions between remainders and executory interests and subsume all remainders, executory interests, reversions, possibilities of reverter, and rights of entry into the phrase “future interests.”<sup>16</sup>

12. UPC § 5-102(1).

13. Cal. Prob.Code Division 4.

14. *Id.*

15. *Restatement (Third) of Trusts* § 1 cmt. e (2003).

16. *Restatement (Third) of Property (Wills and Other Donative Transfers)* § 25.2 (Tentative Draft No. 6, 2010).



*corpus*

Another term for the principal (or res) of a trust as distinguished from its income. *See* Section 9.6.

*curtesy*

*See* **dower**.

*custodian*

A fiduciary designated to handle property under the Uniform Transfers to Minors Act. *See* Section 9.5.

*cy pres*

From the French *si pres*, meaning “as near.” The term is most often used to describe the modification of charitable trusts the terms of which have become illegal, impossible, or impractical to fulfill. *See* Section 9.10. More recently, the term has been used for modifying a private trust which violates the Rule against Perpetuities. *See* Section 11.4.

*deadman statute*

A rule which in some states bars testimony by an interested witness when the opposing party is dead.

*death taxes*

The generic term for taxes occasioned by death. The most common types are the estate tax, imposed by the federal government and several states, and “inheritance” taxes imposed by some states. Inheritance taxes are based on the amount passing to each successor, with different rates for different kinds of successors, *e.g.*, children are taxed at a lower rate than unrelated devisees. The estate tax, on the other hand, is based on the value of the estate as a whole and is not affected by who takes the property, except for the deductions for gifts to spouses and charities. A survey of the federal estate tax appears in Section 15.4. State inheritance taxes vary and the rates are generally much lower than the federal estate tax.

*deed*

Although in ordinary English, the word can refer to any act, in this area of the law it usually means a written instrument transferring property (usually land). *See* Section 4.5.

*descend*

Traditionally land was said to “descend” to the heirs of an individual who died without a will—a so-called “intestate,” whereas personal property was “distributed” to the intestate’s next of kin.<sup>17</sup>

17. 2 W. Blackstone, *Commentaries* 436 (1765) (rules for distribution of an intestate’s goods).  
\*201 (descent is the title to land acquired by an heir).