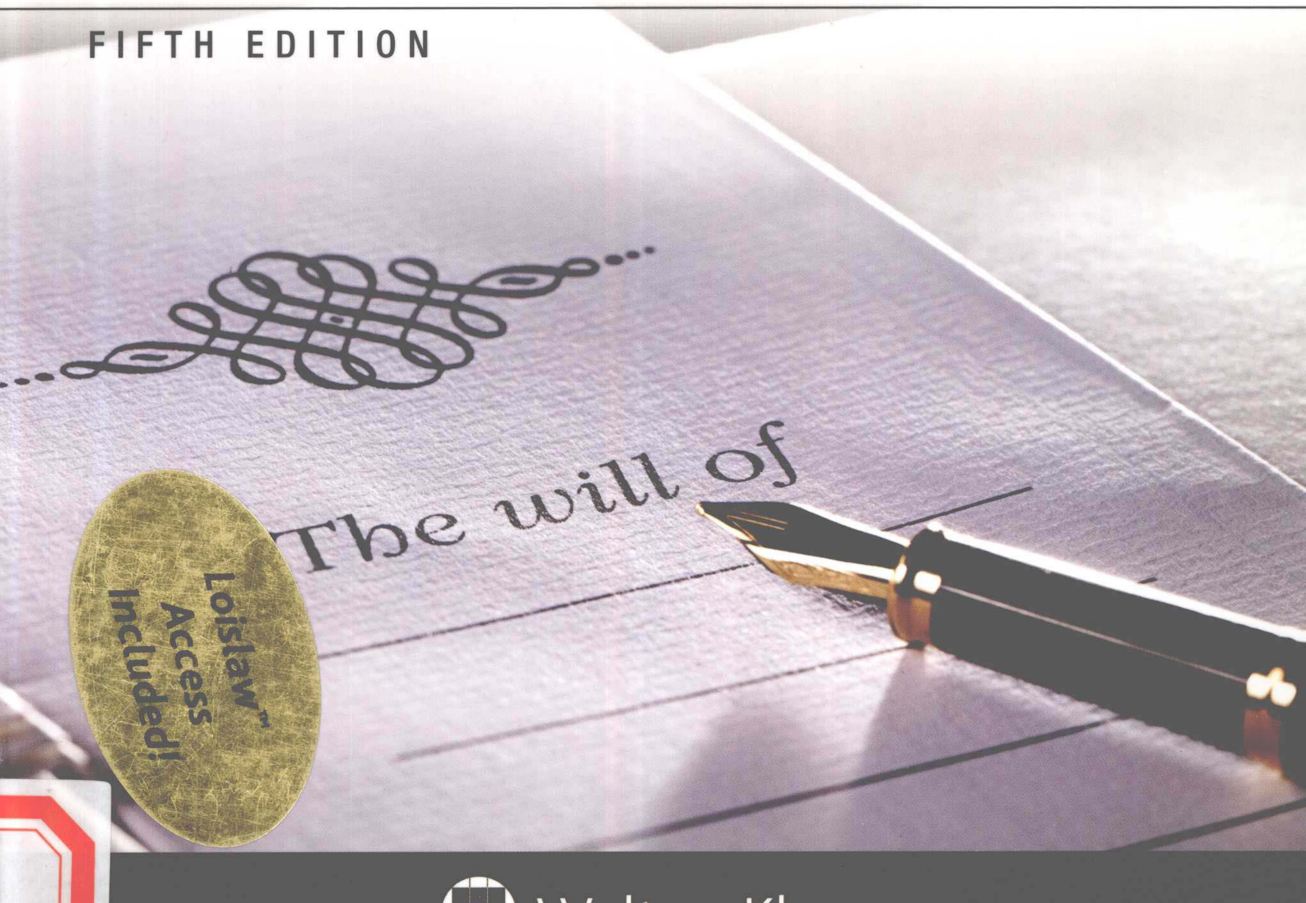
ASPEN COLLEGE SERIES

Jeffrey A. Helewitz

BASIC WILLS, TRUSTS, AND ESTATES FOR PARALEGALS

FIFTH EDITION



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Jeffrey A. Helewitz, Esq.

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Preface

Basic Wills, Trusts, and Estates for Paralegals is designed as an introductory text for students in paralegal programs. Its purpose is to provide a basic understanding of the legal principles involved in estate work. This book will provide all the information that a legal assistant will need to know in order to assist in the preparation and completion of all documents incident to an estate practice. It is not intended to be a seminal thesis.

Because estate law is primarily state statute oriented, a comparison study of all the state statutes has been included as the final chapter of this book. Throughout the work specific reference is made to particular jurisdictions to highlight important or interesting aspects of particular state law. However, reference should always be made to the law of the jurisdiction in which the parties reside or own property.

Jeffrey A. Helewitz

February 2011

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One final thank you goes to the reviewers. Their careful efforts in reviewing the manuscript, and the many thoughtful comments and suggestions that resulted, are greatly appreciated.

Introduction
or
A Fable of Four Families

Once upon a time in the not too distant past there lived four families of diverse ethnic, cultural, racial, and economic backgrounds who, by circumstances too strange to tell, all wound up at the same law firm for advice with respect to their estates. This book relates the odyssey of these four families as they tread the rocky path of estate planning and administration.

Who are these families?

First, there is the **Jones** family. Loretta Jones is a 23-year-old single mother who lives in the city in a one-bedroom apartment that she shares with Evan, her five-year-old son. Ms. Jones is a secretary who is going to school part-time in the evenings, studying to become a paralegal to make a better life for herself and her son. Evan is in kindergarten every weekday morning, and after school Ms. Jones' mother, Aida, looks after him until Loretta comes home from work or school. Evan's father, Jason Leroy, lives in another city and occasionally sends Loretta some money for his son. Loretta's main concern is that, should anything happen to her, Evan would be looked after and his education would be provided for.

The **Bush** family lives in the same city as Loretta and Evan, but their circumstances are entirely different. Oscar and Hyacinth Bush have been married for almost 24 years and have one child, Byron, who is away at the state university. Oscar works for the city government, and Hyacinth takes care of their two-bedroom apartment. Oscar's parents are deceased and he has no siblings. Hyacinth has two sisters: Fern, married to Barney Potts, and Fleur Laplante, who is single. Hyacinth's aged and slightly senile father, David, lives with Fern and Barney in a nearby city. Fern and Barney have one child, a married daughter Rose, and one grandchild, Rose's daughter Davida. Oscar and Hyacinth want to make sure that there is enough money to see that Byron can complete his education and that they can enjoy a comfortable retirement.

The **Lears** are an elderly couple living in the suburbs. Dr. Kingston Lear is a partner in a small medical practice in the city. Donna Lear is a homemaker, active in several charities. The Lears have three grown daughters. Regina was divorced and has two children from her first marriage, Matthew and Mark Hahn. She also has two children from her current marriage to Leonard Dodger, named Mary and Margaret. The Lears' second daughter, Grace, is unmarried and works overseas with the U.S. State Department. Her legal residence is still with her parents. Cornelia, the third daughter, is married to a doctor in partnership with her father and has one son, Anthony. Cornelia also has custody of Regina's two sons. Their father, Joseph Hahn, will have nothing to do with them and rarely pays the child support he is supposed to pay pursuant to the divorce decree between him and Regina. Regina's second husband, Leonard, doesn't like Matthew and Mark and physically abused them. Cornelia went to court and was awarded guardianship of the two boys. At the present time Regina and Leonard are suing Kingston and Donna for title to the house in which Regina and Leonard live. The house was originally purchased by Kingston and Donna as an investment, but after her divorce the Lears let Regina live in the house. When Regina remarried she and Leonard stayed in the house, claiming that the house was theirs, and the family is now involved in a bitter lawsuit over title.

The Lears have a much more complicated situation than the Joneses or the Bushes. The Lears have many valuable assets, have children and grandchildren to look after, and are in the middle of litigation with one of their children. They want to make sure that their grandchildren, Matthew and Mark, are protected and cared for, that Regina and Leonard do not wind up with the house, and that the other children and grandchildren are treated fairly when the Lears die.

Finally, there is Tom **Poole.** Tom is in his mid-thirties, is unmarried, and owns a cooperative apartment in the city. Tom, like Oscar, works for the city, and has managed, by extreme frugality, to acquire a sizable amount of cash and blue chip stocks. Both of Tom's parents, Lottie and Simon, are living, and Tom has an older brother, Ken, who is also unmarried. Tom's brother makes a good living, and his parents, although retired, are fairly affluent. Tom wants to increase the size of his assets so that he will have a comfortable retirement and also wants to see that, in case of death, his estate goes to his friends rather than to his family who does not need his money.

These four families — Loretta Jones and her son Evan, Oscar and Hyacinth Bush, Dr. and Mrs. Lear, and Tom Poole — will be the ships we will guide through the murky waters of estate planning and administration to the golden shore of property distribution.

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1 General Overview of Estate Planning and Estate Administration

LEARNING OBJECTIVES

After studying this chapter you will be able to:

- Differentiate between estate planning and estate administration
- Distinguish between short-term, mid-term, and long-term financial goals
- Discuss various types of estate planning strategies
- Analyze different types of life insurance policies
- Create an effective estate plan
- Discuss the functions of a personal representative
- Explain the standard of care required of a fiduciary
- Understand the role of a legal assistant in the estate administration process
- Differentiate between letters of administration and letters testamentary
- Create a family tree ticker

CHAPTER OVERVIEW

The purpose of this chapter is to provide a general overview and introduction to the concepts of estate planning and estate administration. For most people the word "estate" conjures up visions of mourners in black, bleak cemeteries, and sometimes, wicked stepparents who have control over all the family money. Few, if any, of these visions are true or accurate.

Estate planning is essentially a branch of financial planning. Its purpose is to help the individual acquire and accumulate assets so that all of his or her financial needs and desires during life can be met. The appropriate distribution of these assets on the person's death is merely one aspect of overall estate planning. Rather than being concerned with a person's demise, the estate planner is actually involved with a person's life. If a person has no assets, there is nothing to distribute after death. The estate planner attempts to help the client to have assets sufficiently substantial so that there is a need to plan the distribution of these assets on death.

Estate administration, on the other hand, concerns the distribution of a person's assets after death. One who administers an estate will be involved with passing title to property from the deceased to his or her heirs, according to the wishes of the decedent or the provisions of the state statutes; seeing that all taxes are paid; and insuring the orderly conclusion to the person's legal life. In other words, estate planning helps a person acquire assets during life, and estate administration helps distribute those assets upon the person's death.

This chapter will discuss the various approaches that can be used for the proper planning and administration of an estate, the courts and statutes that are involved in both the planning and administration of the estate, and the role of the legal assistant with respect to the foregoing.

Estate Planning

Estate planning can be defined as the method whereby a person accumulates, manages, and disposes of real and personal property during his life and after his death. The primary function of effective estate planning is to meet the short- and long-term financial needs of the client and to see that the client's particular concerns can be met after his death. Although all estate planning is concerned with the acquisition of property with the least possible negative tax consequences, each person's financial plan will of necessity be different because of each person's unique financial needs.

Lawyers and financial planners are involved in creating an estate. The financial planner, usually certified, is conversant with all types of potential investments that can provide either capital growth or income. In order to see that the investment objectives designed by the financial planner are met, the attorney is involved in the preparation of all legal documents pertaining to these investments. In each case, the legal assistant aids in gathering the information necessary to create the estate plan.

The first questions to be answered with respect to estate planning are: What are the client's current assets? Family situation? Financial goals? In order to be effective and appropriate, the estate plan must take into consideration all of these factors.

If a client has few assets, the first objective is to devise a method whereby he or she can accumulate some property. This requires a detailed analysis of all of his or her income and expenses and a determination of how much of that income is disposable. **Disposable income** is that income a person has after paying all taxes and expenses for a given period (a week, a month, etc.). It is only this money that can be used to acquire assets; the rest of the income is being used to support his or her current life. If a person has no disposable income, it becomes necessary to create a budget so that some income, however little, can be saved. Conversely, if a person has a great deal of disposable income, it is necessary to see that the income is appropriately invested so as to meet the future financial needs of the client.

EXAMPLES:

1. Loretta Jones has a very modest salary. At the end of the month, after paying rent, utilities, food, tuition, and so forth, she has very little left as disposable income. Loretta needs to find out whether there is some way she could better manage her money so as to accumulate some savings.

2. Tom Poole spends very little of his actual income. At the end of the month he has several thousand dollars left. Tom needs to find appropriate investments for his disposable income to make it productive, that is, to produce more income or growth.

Each person's family situation helps determine his or her financial needs. The financial needs of a couple who is retired with grown children are entirely different from those of a single mother with a young child. Estate and financial planning is concerned with assuring that the financial needs of the client's family can be met: providing for the education of a young child, purchasing a first home for a young couple, and assuring a worry-free retirement.

Finally, the financial wishes of the client must be taken into consideration. It may be well to provide for needs, but most people would like to see their hard work result in more than just basic necessities. Vacations, buying a first or second home, purchasing a car or boat, and so on, are all worthwhile and psychologically necessary ingredients of each person's estate plan.