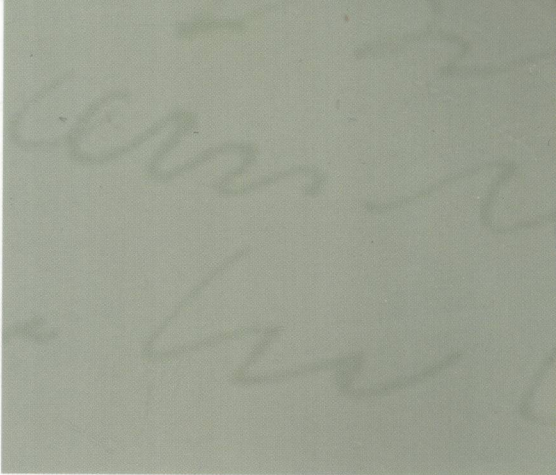
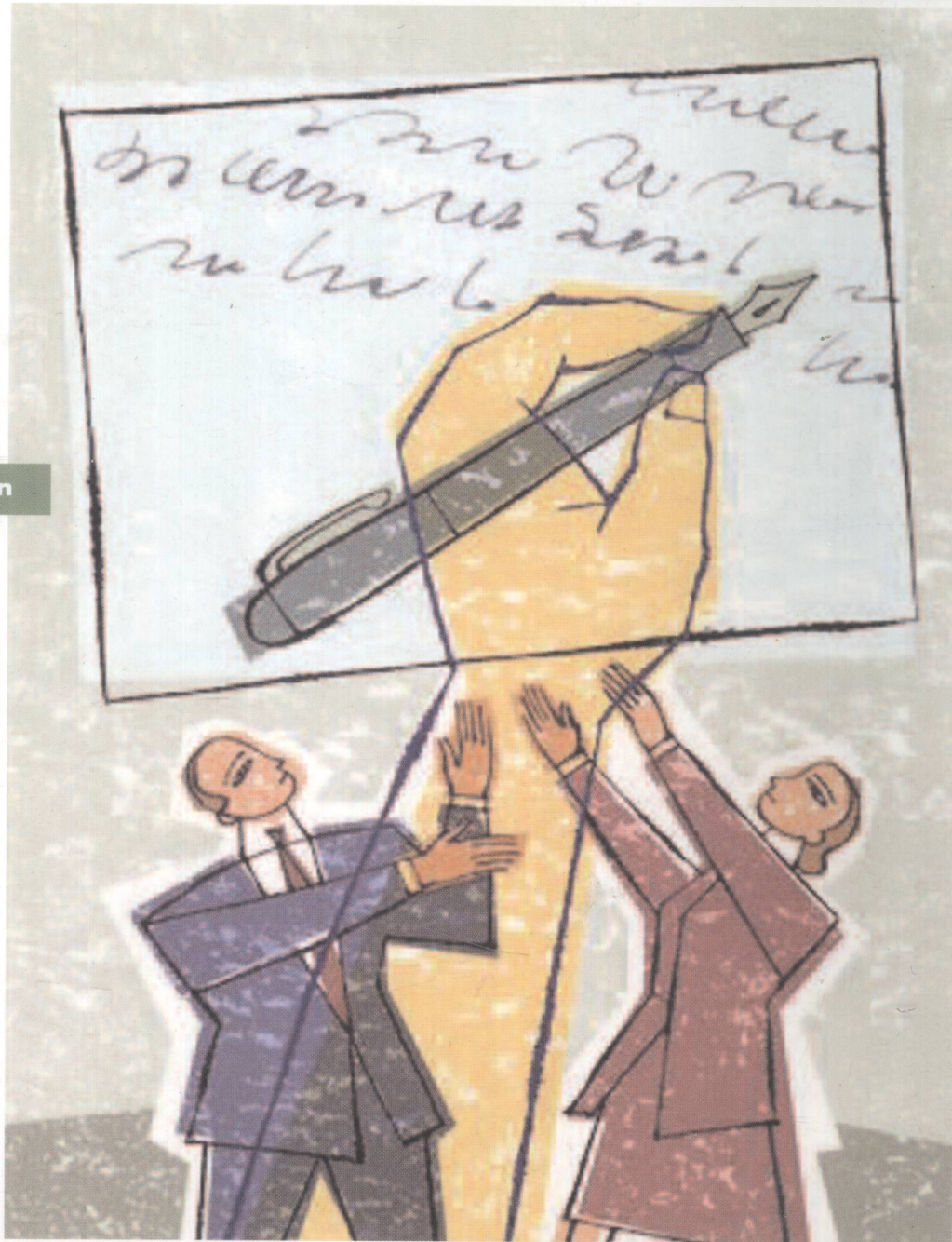


WILLS, TRUSTS, **AND** ESTATES ADMINISTRATION



second edition



AN D.
RSKOWITZ

D971.23
S617
E-2

WILLS, TRUSTS, AND ESTATES ADMINISTRATION

2ND EDITION

Suzan D. Herskowitz
Attorney at Law



E200603893



Upper Saddle River, New Jersey 07458

Library of Congress Cataloging-in-Publication Data

Herskowitz, Suzan 1961-

Wills, trusts, and estates administration / Suzan D. Herskowitz.—2nd ed.

p. cm.

Rev. ed. of: Wills, trusts, and estates. c2001.

Includes bibliographical references and index.

ISBN 0-13-172026-0

I. Inheritance and succession—United States. 2. Legal assistants—United States—Handbooks, manuals, etc.

I. Herskowitz, Suzan 1961 - Wills, trusts, and estates. II. Title.

KF753.Z9H47 2007

346.7305'2—dc22

2006041572

Editor-in-Chief: Vernon R. Anthony

Director of Production and Manufacturing: Bruce Johnson

Senior Acquisitions Editor: Gary Bauer

Assistant Editor: Linda Cupp

Development Editor: Athena Group, Inc.

Marketing Manager: Leigh Ann Sims

Marketing Coordinator: Alicia Dysert

Managing Editor—Production: Mary Carnis

Manufacturing Buyer: Ilene Sanford

Production Liaison: Denise Brown

Manager of Media Production: Amy Peltier

Media Production Project Manager: Lisa Rinaldi

Full-Service Production/Composition: Lindsey Hancock/Carlisle Publishing Services

Director, Image Resource Center: Melinda Reo

Managing, Rights and Permissions: Zina Arabia

Manager, Visual Research: Beth Brenzel

Manager, Cover Visual Research and Permissions: Karen Sanatar

Image Permission Coordinator: Nancy Seise

Senior Design Coordinator: Christopher Weigand

Cover Design: Kevin Kall

Printer/Binder: Hamilton Printing

Cover Printer: Coral Graphics

Photo Credits

Page 4: PhotoEdit Inc., Photo by Paul Conklin. Page 63: Steve Owens/Taxi/Getty Images. Page 79: Getty Images, Inc. Page 88: PhotoEdit Inc., Photo by Jeff Greenberg. Page 92: SuperStock, Inc. Page 102: Stockbyte. Page 114: Getty Images, Inc.-Photodisc. Page 265: AP Wide World Photos.

Copyright © 2007, 2001 by Pearson Education, Inc., Upper Saddle River, New Jersey 07458. Pearson Prentice Hall. All rights reserved. Printed in the United States of America. This publication is protected by Copyright and permission should be obtained from the publisher prior to any prohibited reproduction, storage in a retrieval system, or transmission in any form or by any means, electronic, mechanical, photocopying, recording, or likewise. For information regarding permission(s), write to: Rights and Permissions Department.

Pearson Prentice Hall™ is a trademark of Pearson Education, Inc.

Pearson® is a registered trademark of Pearson plc

Prentice Hall® is a registered trademark of Pearson Education, Inc.

Pearson Education Ltd.

Pearson Education Singapore, Pte. Ltd.

Pearson Education Canada, Ltd.

Pearson Education—Japan

Pearson Education Australia PTY, Limited

Pearson Education North Asia Ltd.

Pearson Educación de Mexico, S.A. de C.V.

Pearson Education Malaysia, Pte. Ltd.



10 9 8 7 6 5 4 3 2 1
ISBN: 0-13-172026-0

Pearson Legal Series

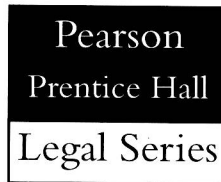
Pearson Legal Series provides paralegal/legal studies students and educators with the publishing industry's finest content and best service. We offer an extensive selection of products for over 70 titles and we continue to grow with more new titles each year. We also provide:

- online resources for instructors and students
- state-specific materials
- custom publishing options for Pearson Custom Publishing group

To locate your local Pearson Prentice Hall representative, visit www.prenhall.com

To view Pearson Legal Series titles and to discover a wide array of resources for both instructors and students, please visit our website at:

www.prenhall.com/legal_studies



.....

PREFACE

Wills, Trusts, and Estates Administration is a textbook specifically designed for paralegal students and legal professionals. Any book for paralegal or legal assisting students and professionals must be cognizant of the fact that legal assisting training can vary widely. Therefore, a book for paralegals must take all types of readers and their objectives and levels of sophistication into account. This book does not presuppose a prior background in legal studies of any kind. This book is appropriate for the longtime continuing student, and it is ideal for the lifelong learner.

The time available for study of wills, trusts, and estate administration will vary from program to program and practice to practice. This book in the field of legal assisting encompasses the various program modalities, i.e., four-year-programs, two-year programs, and certificate programs. The core materials may easily be covered in a six-week course. There are ample materials for those instructors with the luxury of a long semester in which to cover the materials or for the professional needing a comprehensive desk reference. Each chapter can be used independently of the chapters before and after it.

The goal of this book is to cover the information in a clear and concise manner so that a reader will be confident that the knowledge gained and aided by this text will serve the reader throughout his or her career in legal assisting or beyond. Various features motivate the reader and reinforce learning difficult concepts through language that is easy to understand without becoming boring or pedantic. Illustrations, charts and tables, terminology, and appellate course cases illustrative of core concepts are found throughout the text. Appendices include wills of some famous people and Form 706 in its entirety. It will be up to the instructor's discretion as to whether or not to assign reading from the appendices or to give detailed instruction on filling out Form 706. Chapter objectives are found at the beginning and summaries at the end of each chapter. Review questions and projects are designed so that instructors can make assignments appropriate for their individual programs and students. Such pedagogical features assist in the retention of learning key concepts.

A new Chapter Twelve has been added for this 2nd edition. Entitled Alternate Family Lifestyles, Chapter Twelve discusses issues facing American families that the law is grappling to keep up with and address such as stepfamilies, civil unions, and gay and lesbian couples.

Due to the nature of the subject matter, no objectives, goals or projects have been included. Instructors will have to make their own determinations regarding coverage of these topics based upon time limitations, school policies, and other considerations that can be determined only in the classroom.

The purpose of this chapter is to point out that these matters are creating food for thought, not only in politics, but in our courts and in law offices.

One feature of this book which is different from others is that the appellate court cases are not heavily edited or “briefed” in advance. The lack of editing has been purposely done so that the very important task of properly reading and briefing cases is reinforced throughout, not just during a legal research class. It will encourage the reader to read a case properly, analyze it, and synthesize the outcome in each case to the concepts being taught in that chapter. It also provides an opportunity to explain the legal system as a whole and to provide an opportunity for spirited debate on various legal issues.

ACKNOWLEDGMENTS

I would like to thank my former students at Keiser College, Fort Lauderdale, Florida, for being part of my “laboratory” during the drafting of the 1st edition. They listened to lectures, answered sample review questions, participated in many of the projects throughout the text, and offered numerous suggestions and comments, all with good cheer.

I would also like to thank the reviewers whose constructive criticism has been most helpful:

1st edition:

Thomas F. Goldman, Esq., *Bucks County Community College*

Ed Whittle, Esq., *Florida Metropolitan University*

Stephanie Delaney, Esq., *Highline Community College*

2nd edition:

Beverly Broman, *Duff's Business Institute, Pittsburgh, PA*

W. Charles McNeil, J.D., *Parks College, Thornton, CO*

Tameiko Allen, J.D., *Florida Metropolitan University, Jacksonville, FL*

Kathryn Myers, *Saint Mary-of-the-Woods College, Saint Mary-of-the-Woods, IN*

Candace Weiss, *Wharton County Junior College, Richmond, TX*

Thomas F. Goldman, Esq., *Bucks County Community College, Newtown, PA*

I would like to take this opportunity to acknowledge the wonderful people at Pearson Prentice Hall for bringing this project to fruition.

.....

CONTENTS

Preface xi

Chapter One: Purpose and Need for a Will 1

Objectives	1
Why Most People Don't Have Wills	2
What Is a Will?	2
The Need for a Will	3
Death Taxes	3
Distribution of Wealth	4
Appointment of Guardians for Minors	4
Creation of a Testamentary Trust	5
Appointment of a Personal Representative	6
Funeral Arrangements and Organ Donation	6
Summary	6
Review Questions	7

Chapter Two: Property 8

Objectives	8
Classification and Definition of Property	9
Real Property	9
Personal Property	10
Forms of Property—Who Owns What?	11
Owned in Severalty	11
Joint Ownership	11
Joint Tenancy	12
Tenants in Common	14
Tenancy by the Entirety	17
Community Property	18
Estates	18
Fee Simple	18
Life Estate	19
Tenancy for Years	20
Probate Versus Non-Probate Assets	21
Life Insurance	21
Pay-on-Death	22
Living Trusts	22

Life Estates	23
Joint Tenancy with Right of Survivorship	23
Summary	23
Review Questions	24
Projects	25

Chapter Three: Testate or Intestate 26

Objectives	26
Testacy	27
Types of Dispositions	27
Abatement	29
Ademption	30
Anti-lapse	31
Methods of Distribution—Per Stirpes Versus Per Capita	31
Intestacy	33
Intestate Succession Defined	33
Intestate Succession Laws	34
Relationship of the Heir to the Decedent	34
Lineal and Collateral Consanguinity	35
Determining Degree of Kinship	35
Relationship by Affinity	37
Surviving Spouse	37
Adopted Children	39
Illegitimate Children	39
Half-Blood	39
Pretermitted Children	39
Pretermitted Spouse	40
Escheat	47
Other Family Rights	49
Homestead Exemption	49
Homestead Allowance	49
Exempt Property	49
Family Allowance	50
Surviving Spouse's Elective Share	50
Other Issues That Affect Distribution of the Estate	51
Homicide by Beneficiary or Heir	51
Simultaneous Death of Decedent and Beneficiary	52
Summary	52
Review Questions	53
Projects	53

Chapter Four: The Will 55

Objectives	55
A Short History of Wills	56
Validity	56
Statutory Requirements	56
Intent and Capacity	57

Is the Will Written or Oral	63
Signature of the Testator	78
Witnesses	80
Notary Public—Self-Proof Clauses and Affidavits	80
Changing or Revoking a Will	81
Changing a Will	81
Revoking a Will	82
Joint and Mutual Wills	84
Will Contests	84
Summary	85
Review Questions	86
Projects	86

Chapter Five: Will Preparation and Drafting 87

Objectives	87
Client Conference	88
Family Information	89
Client Assets and Liabilities	89
Other Important Information	90
Drafting	92
Opening Clause	92
Instruction to Pay Debts	93
Dispositive Provisions	93
Appointment of the Personal Representative	93
Personal Representative's Duties	93
Appointment of Guardian for Minor Children	93
Last Clauses in the Will	93
Self-Proof Affidavit	94
Execution of the Will	100
Where to Keep the Will after Execution	101
Summary	103
Projects	104

Chapter Six: Advance Directives 105

Objectives	105
History of the Right to Die	106
Living Wills	108
Requirements for a Living Will's Validity	109
Do Not Resuscitate Orders	113
Health Care Surrogates and Proxies	116
Durable Powers of Attorney	121
Anatomical Gifts	126
By Will	127
By Signed Document	127
By Others	127
Summary	142
Review Questions	142
Projects	142

Chapter Seven: Trusts: Elements and Purpose 143

Objectives	143
Terminology Relating to Trusts	144
Trust Elements	144
Trustor	145
The Trustee	145
Trust Property	146
The Beneficiary	158
Trust Purpose	158
Trust Classifications	158
Express or Implied	158
Testamentary or Inter Vivos	169
Revocable or Irrevocable	170
Pourover Wills	170
Termination of a Trust	171
Drafting a Trust	171
Summary	187
Review Questions	187
Project	188

Chapter Eight: Specialized Trusts 189

Objectives	189
Spendthrift Trust	190
Sprinkling and Spray Trusts	190
Advantages of a Sprinkling Trust	191
Disadvantages	191
Marital Deduction Trust	192
Marital and Family Trusts	192
Qualified Terminable Interest Property (QTIP) Trust	192
Life Insurance Trust	193
Charitable Trusts	193
Charitable Remainder Trusts	194
Cy Pres Doctrine	194
Summary	195
Review Questions	196
Project	196

Chapter Nine: The Personal Representative 197

Objectives	197
Types of Personal Representatives	198
Named in the Will	198
Intestate Decedent	198
Successor Personal Representative	199
Administrator with Will Annexed	199
Special Administrator	199
Administrator Pendente Lite or Administrator Ad Litem	199
Appointment	200

Personal Representative's Duties	200
Bond	204
Removal of Personal Representative	204
Liability of the Personal Representative	205
Summary	205
Review Questions	206

Chapter Ten: Estate Administration 207

Objectives	207
Overview of the Probate Process	208
Preliminary Duties Of The Law Office	209
Obtaining the Death Certificate	209
Opening the Decedent's Safe Deposit Box	209
Searching the Decedent's Home or Office	209
Allowances	211
Guardianship of Minors	211
Small Estate Settlement	211
Formal Probate Administration	211
Petition	213
Notice to Other Interested Parties	216
Proof of Will	216
Bond and Testamentary Letters	217
Inventory	217
Estate Expenses, Debts, and Taxes	217
Distribution to Beneficiaries	224
Final Accounting	224
Ancillary Administration	224
Summary	238
Review Questions	239
Projects	240

Chapter Eleven: Tax Considerations in Estate Administration 241

Objectives	241
The Fiduciary's Obligations	242
Notification of Decedent's Death to IRS	242
Employer Identification Number Application	242
Decedent's Final Income Tax Return	243
Decedent's Medical Expenses	243
State Income Tax Returns	244
Federal Income Tax Return of the Estate	244
The Estate Tax Return—Valuing the Estate	244
Decedent's Gross Estate	245
Form 706: Schedules Relating to Assets	247
Deductible Items	251
Form 706: Schedules Relating to Deductions	251
Form 706: Schedules Relating to Credits	252

Exclusion Amount	252
Summary	253
Review Questions	253

Chapter Twelve: The Probate Court and Uniform Laws 254

Objectives	254
Jurisdiction	255
Registry with the Court Clerk	264
Uniform Probate Laws	265
Summary	267
Review Questions	267
Project	268

Chapter Thirteen: Alternate Family Lifestyles 269

The Right to Leave Your Property to Whomever You Want and the Right to Contract	271
Stepparents, Stepchildren and Grandchildren	275

Appendix A: Important Cases Concerning the Right to Die 276

Cruzan v. Director, MDH	276
Anderson v. St. Francis-St. George Hospital, Incorporated	315
Jeb Bush, v. Michael Schiavo	320
State of Oregon, Plaintiff-Appellee, v. John Ashcroft	336

Appendix B: Selected Wills of Famous People 339

The Will of Diana, Princess of Wales	339
The Will of Jerry Garcia (of the Grateful Dead)	345
Last Will and Testament of Warren E. Burger (Former U.S. Supreme Court Chief Justice)	354
The Will of Babe Ruth	355
The Last Will and Testament of William Shakespeare	362
Last Will and Testament of Francis Albert Sinatra Also Known as Frank Sinatra	365
Last Will & Testament of John Lennon	375
Last Will & Testament of John F. Kennedy, Jr.	377

Appendix C: Internet Websites 379

Appendix D: Internal Revenue Forms 384

Appendix E: Sample Client DATA Sheets 435

Glossary 453

Index 461

1

**PURPOSE
AND NEED
FOR A WILL**

OBJECTIVES

At the end of this chapter, the student will understand:

- the definition of a will
- why a will is necessary
- common terms used in the study of wills and trust

What is the purpose of a will? Why do we all need one? These questions may not seem interesting or important to most people. Most people don't like to think about wills. And for younger people, death seems a long way off.

For some students who are studying to be paralegals, wills don't seem particularly interesting either. Wills don't hold the same appeal as a custody battle, a car wreck, or a juicy murder trial. Keep in mind that many people will never be involved in custody suits or automobile accidents, if they are lucky. Most people will never be involved in a murder. As Ben Franklin said, however, two things in life are certain—death and taxes. Suddenly, the study of wills becomes much more important.

WHY MOST PEOPLE DON'T HAVE WILLS

Roughly 95 percent of all adults in the United States should have or are not prohibited from executing a will. Yet approximately 70 percent of the total population in the United States does not have a will. That means that only three out of every ten people have a will.

Wills are not something people look forward to with a sense of happy anticipation. The average person looks forward to enjoying certain benefits available upon reaching the age of majority (age 18 in most states.) He or she can't wait to get a driver's license without restrictions; to vote in state and national elections; to drink legally; and to not require parental permission, to name a few benefits of majority. Yet, while the ability to execute a will is also a privilege of majority, it is not something most healthy adults dream of doing in the near future. Rather, most relegate having a will drafted for them to the area of "some-day soon."

Nobody wants to think about his or her death, especially when one is young, healthy, and has an entire lifetime ahead. Procrastination and the fear of one's own mortality are probably the two main reasons a person does not execute a will.

Another reason is that many people look around at their accumulated property and assume they don't have "enough" wealth to warrant the time and expense of having a will drafted. One thing a paralegal should keep in mind is that everyone has property, and some people have much more than they realize.

The remainder of this chapter will discuss wills in general (wills will be discussed fully in Chapters Four and Five), their purpose, and why, despite the average person's seeming aversion to them, they are so very important.

WHAT IS A WILL?

A **will** is a written declaration of a person's intent to distribute property after death. This definition is important to remember since, while a will is a legally binding document, it only becomes effective upon death. All wills are **ambulatory**. This means that a person may change or revoke a will at any time before his or her death.

That person may also sell or give away any property given to a **beneficiary** in the will and not be concerned that the beneficiary will not receive the property upon his or her death. In practical terms, this means that Ms. **Testator** can, if she desires, **execute** a will in January, change it in March, sell certain property promised to someone in the will in April, buy additional property in June, and effectively change all her beneficiaries in September—and nothing can be done about it. Until Ms. Testator dies, a will only expresses her intent. Only upon her death are the expressions made in her will legally binding.



Ambulatory Nature of a Will

Example: In his will dated March 1, 1994, Jim Simon left his car, a green 1980 Jaguar XJS convertible, to his daughter, Beth, and his CrissCraft motorboat to his nephew, Bill Parks. He also left his ski lodge in Aspen to his son, Graham. He gave the rest of his property to various charities.

Jim sold the Jaguar in September 1995. In March 1996, he gave the ski lodge to an old army buddy as a birthday present. Jim then died in April 1996.

Beth will not receive the Jaguar since Jim sold it before his death. Graham will not receive the ski lodge since Jim gave that away also. The only beneficiaries that will benefit from Jim's will are his nephew, Bill, and the named charities.

THE NEED FOR A WILL

What will happen if someone dies without a will? Examine this scenario: Bobbie Black was a successful business person, a single mother with two teenage children. She died unexpectedly in a car accident while on the way to a business appointment. After an exhaustive search of Bobbie's personal belongings; inquiries to friends, family, her ex-husband, and business associates; and a court-ordered search of her safe deposit box, it was concluded that Bobbie died without a will.

Bobbie died **intestate**. This means she died without having executed a will, and the laws of **intestate succession** will determine how and to whom all the property she possessed will be distributed. (Intestacy will be discussed in Chapter Three.)

In no particular order of importance, the following is a list of consequences that may occur if someone dies intestate.

Death Taxes

When a person dies, the **estate** is subject to taxation in the form of state and federal estate taxes, and in some states, inheritance taxes. If Bobbie had a will, she could have determined how and from what source any death taxes owed would be paid.



Clients often meet with their lawyers to discuss the terms of their will.

This is done through the use of an **apportionment clause**. Since there was no will, state law will determine the method by which the taxes will be paid. Through proper estate planning, Bobbie may have been able to save a considerable amount of money from being given to the government in the form of taxes. Without a will, this is no longer an option.

Distribution of Wealth

Most people consider the ability to determine who will receive their property upon their death to be the paramount reason for executing a will. When someone dies intestate, the state, not the individual, determines how much and to whom all the deceased's property will go. Often, the distribution is not as the deceased intended.

If, for example, Bobbie had recently remarried, she may have wanted to name specific funds for the benefit of her children. Perhaps she wanted to insure that her sister was well taken care of. Unless there is a will stating the unequivocal intent of the decedent, the state probate court will follow the letter of the law and distribute the property as set out by state statute.

Appointment of Guardians for Minors

Bobbie left two teenagers behind when she died: a son, aged 13, and a daughter, aged 15. Without a will that specifically stated whom she wanted to take care of her children and their property, the appointment of the minor children's guardian, or guardians, will be determined by a court.

A **guardian** is a person who is appointed to care for and manage the minor person, the minor's property, or both person and property. The **guardian of the person** is responsible for the care and custody of the minor person. The **guardian of the property** is responsible for a minor's property until the child reaches the age of majority or is otherwise legally emancipated. While a minor's parents are always the natural guardians of the person, they are not the natural guardians of the property.

In our scenario, we will assume that Bobbie would have wanted the children's father to be their guardian, and in fact, the father would automatically be the guardian of the person of both his children. However, since Bobbie died intestate, a few potential problems might still arise.

The first is that while the court will probably appoint the father as the children's guardian of the person, it may not name him as guardian of their property. This would be an undue hardship if the father had to formally request funds for his children's care and well-being with regularity.

A second potential problem will arise if one of Bobbie's relatives fights the ex-husband for custody. Despite being first choice as guardian by any court, it is possible that someone could convince the court that it would not be in the children's best interest for the father to be named as the children's legal guardian.

What would happen if the children's father had predeceased Bobbie? A court will have to select a guardian based on "the best interest of the child." Usually, this will be a blood relative. If Bobbie had a will, she could have named her first choice, her closest friend, Sally, to be her children's guardian. Since Bobbie didn't have a will, it is more likely that the court will appoint Bobbie's mother, despite the fact that Bobbie and her mother did not get along and that Bobbie believed her mother would not raise the children in the manner that Bobbie preferred.

It is also possible that the children will be split up if both Bobbie and her ex-husband are deceased. This is especially a problem when there are no surviving blood relatives or when the potential guardians cannot take more than one child without hardship.

Another potential method of protecting the children is through the use of a preneed guardianship document, which will be discussed fully in Chapter Six.

Creation of a Testamentary Trust

A trust is a legal agreement in which a person called the **settlor** transfers legal title of property to a **trustee**. The trustee will then manage the property for beneficiaries. A **testamentary trust** is a trust which is drafted as part of the testator's will and only becomes effective upon the testator's death.

Bobbie had amassed a large and lucrative stock portfolio, which upon her death passed to her children. If she had a will, she could have established a testamentary trust. This trust would have set many parameters for the care and control of the stocks, as well as the distribution of the dividends and other stock income. For example, she could have determined when the brokerage firm could be replaced, guidelines for divesting the stocks, and how much income the children would receive, how often, and for what purpose. The assets in the trust would not