STATE LAW PITFALLS:

DON'T STEP IN IT WHEN

YOUR CLIENTS STEP ACROSS STATE LINES

DR. GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
3311 18th Street
Lubbock, TX 79409-0004

(806) 834-4270
gwb@ProfessorBeyer.com
www.ProfessorBeyer.com
www.BeyerBlog.com

KNOXVILLE ESTATE PLANNING COUNCIL

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Texas Tech University School of Law
Lubbock, TX 79409-0004
(806) 834-4270
gwb@ProfessorBeyer.com – www.ProfessorBeyer.com

EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Regent and Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)

SELECTED HONORS

Order of the Coif
Distinguished Probate Attorney Lifetime Achievement Award, REPTL Section, State Bar of Texas (2022)
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2022); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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I. INTRODUCTION

"This thorn in my side is from the tree I've planted."[1]

All it takes is one carelessly drafted will provision to place you in the hot seat for months or years where you might watch your personal, professional, and financial life crumble around you.

One type of drafting error is the failure to anticipate that your client's estate plan will be in whole or in part governed by the laws of another state. This can happen for two main reasons.

First, your client may die domiciled in another state. Statistical studies show that approximately 7,628,000 people move to a different state each year.[2] Second, your client may own real property in another state.

This article focuses on some of the major state law differences in substantive and procedural law.[3] Once you recognize these differences, you may then take proper steps to plan for them as you draft your clients' wills and trusts. [4]

II. ASCERTAINING GOVERNING LAW

A. Personal vs. Real Property

Issues regarding the transfer of real property at death are governed by the law of the state in which the land is located. On the other hand, the law of the decedent's domicile at the time of death governs personal property matters. Thus, you may need to apply the probate laws of several states to determine the proper distribution of a decedent's estate.

B. Property Ownership (Marital Rights)

If the decedent was married at the time of death, it is crucial to determine which property the decedent owned at death and which property actually belongs to the surviving spouse. Only the deceased spouse's property will pass through intestacy or be controlled by the deceased spouse's will.

You must determine what type of marital property system governs the parties and their property. Two types of marital property systems are used in the United States: *common law* and *community property.* Under a common law system, each spouse owns his or her entire income as well as any property brought into the marriage or acquired during the marriage by gift. Under a community property system, each spouse owns any property brought into the marriage or acquired during the marriage by gift, but only one-half of his or her income; the other half of the income vests in the other spouse as soon as it is earned. Although only nine states use

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* Portions of this article are adapted from GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES: EXAMPLES & EXPLANATIONS (7th ed. 2019).

[1] Metallica, *Bleeding Me* (track 7, Load) (1996).

[2] *See* David Bancroft Avrick, *How Many People Move Each Year – and Who Are They?*, MelissaData.com available at https://www.melissadata.com/enews/articles/0705b/1.htm (last visited on Feb. 17, 2018).

[3] Note that this article is not designed to be a comprehensive review of all state law differences that you may need to consider. Instead, I am attempting to highlight those that arise with greater frequency or are of greater importance.

[4] You may also need to do planning for clients who move to another country. Each year, approximately 1,269,000 people move to a different country. Planning for clients who change their country of residence or citizenship is beyond the scope of this seminar.

the community property system (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington along with Wisconsin due to its adoption of the Uniform Marital Property Act), these states account for over 25 percent of the population of the United States. One state, Alaska, permits married couples to hold their property as community property if they so desire.

If the spouses have lived in more than one type of marital property jurisdiction during the marriage, you must determine whether a spouse's earnings (and, consequently, any property purchased with those earnings) belong solely to the spouse who earned the money or whether the earnings are co-owned.

The general rule is that the ownership of the earnings is governed by the law of the spouse's domicile at the time the property was acquired. Marital title does not change as the couple moves from one type of marital property state to another.

For example, assume Wife earned $100,000 while domiciled in a common law marital property state and placed it into a certificate of deposit (CD-1). Husband and Wife then moved to a community property marital property state. Wife earned an additional $100,000 and placed it into another certificate of deposit (CD-2). What property may Wife dispose of by her will?

CD-1: The $100,000 Wife earned and placed in CD-1 is her separate property under the law of the common law marital property state in which she earned the money. The key issue is what happens to the characterization of CD-1 when the couple moves into the community property state. Under the law of many community property states, CD-1 would remain Wife's separate property, and she could leave it to whomever she desires. However, some community property states would characterize CD-1 as *quasi-community property*, that is, property that was acquired in a common law marital property state but that would have been community property if acquired in the community property state. Under the law of these community property states, Husband would become the owner of one-half of CD-1 upon Wife's death and Wife would only be able to control the disposition of the other half. Another important issue is the characterization of the interest that CD-1 has earned. Pre-move interest will either be Wife's separate property (allowing her to dispose of all the pre-move interest) or quasi-community property (allowing her to dispose of one-half of the pre-move interest). Depending on the particular law of the community property state, post-move interest may either remain Wife's separate property (allowing her to dispose of all of the post-move interest) or become community property (allowing her to dispose of one-half of the post-move interest).

CD-2: CD-2 is community property because Wife earned the money placed in CD-2 while domiciled in a community property state, which treats income as if earned equally by each spouse. Thus, Wife may dispose of one-half of CD-2, both principal and interest, by her will.

C. Will Validity

The only way for a person to avoid having the probate estate pass to heirs under the law of intestate succession is to execute a valid will. A person has, however, no right to make a will. The United States Supreme Court confirmed that "[r]ights of succession to the property of a deceased … are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."[5]

Although not required to do so, all state legislatures have granted their citizens the privilege of designating the recipients of their property upon death. A state legislature could take away this privilege at any time. Of course, any legislator who voted to curtail the ability of a person to execute a will would be highly unlikely to be reelected!

Because the ability to execute a will is a privilege, a will typically has no effect unless the testator has precisely followed all the requirements. Most states demand strict

[5] Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).

compliance with the requirements discussed in this chapter; one trivial deviation may cause the entire will to fail. A few states, however, have adopted the *substantial compliance* standard of U.P.C. § 2-503, which grants the court a *dispensing power* to excuse a harmless error if there is clear and convincing evidence that the testator intended the document to be a will.

Most states have a *savings statute* permitting a will that does not meet the requirements of a valid will under local law nonetheless to be effective under certain circumstances. For example, U.P.C. § 2-506 provides that a testator's written will is valid, even though it does not satisfy the normal requirements, if it "complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national."

D. Will Construction and Interpretation

Issues of will construction and interpretation are generally governed by the law of the jurisdiction under which the property at issue passes. Thus, for personal property, the law of the testator's domicile at time of death normally controls. For real property, the law of the situs of the real property controls. There are some cases, however, that hold that if the testator lived the majority of the testator's life in one state and was domiciled in a different state at the time of death, the law of the first state controls.

The default rules regarding many construction and interpretation issues vary greatly among the states. It is difficult to anticipate all the possibilities when drafting a will. One technique that might work is for the testator to specify the state law which the testator desires to be used to interpret and construe the will.

III. WILL EXECUTION

The formal requirements for a valid will vary among the states. Although a savings or substantial compliance statute may "save the day" when a client moves states, prudent practice is to have a will execution ceremony which is likely to satisfy the requirements of as many states as possible. This section discusses some of the main differences among the states.

A. Location of Testator's Signature

The original Statute of Frauds and the law of most states today do not mandate the location in which the testator's signature must appear. See U.P.C. § 2-502. Thus, the testator's signature may appear at the top, in the body, in the margin, or at the end of the will. However, some states follow the lead of the 1837 Wills Act and require that wills be subscribed or signed at the end or *foot* of the instrument.

B. Proxy Testator Signature

Most states permit the testator's signature to be affixed to the will by another person. A proxy signature, also called a signature per alium, must meet statutory requirements, which typically include two main components. First, the proxy must sign in the testator's presence; second, the proxy must sign at the testator's direction. See U.P.C. § 2-502(a)(2). Some states require the proxy's own signature to appear on the will as well. Even if the proxy's signature is not required, it is good practice to obtain it.

C. Witnessing

Originally, the Statute of Frauds required an attested will to have three or four witnesses. The Wills Act of 1837 reduced the number of witnesses to two. All states now require two witnesses. Note that until July 1, 2006, Vermont required three witnesses. Some extra-cautious practitioners routinely have extra witnesses just in case additional testimony is needed to prove what occurred during the will execution ceremony.

In a break from tradition, U.P.C. § 2-502(a)(3) dispenses with the witnessing requirement if the testator acknowledges the will in front of a notary public or other individual authorized to take acknowledgments. A few states have already enacted this new provision.

D. Publication

In most states and under U.P.C. § 2-502(a), there is no requirement that a testator *publish* the will

to the witnesses, that is, tell the witnesses that the document they are witnessing is a will.

There are, however, a significant number of states that require publication either for the will itself or for the self-proving affidavit. In these states, the witnesses must know that they are witnessing a will. The testator should tell the witnesses, "This is my will," show them the top of the first page of the document, or take some other step to make certain the witnesses are aware of the nature of the document. Even in the states that require publication, the witnesses do not need to know the contents of the will.

E. Presences

States vary considerably regarding which one or ones of the three presences are required for a valid will. Good practice is to assure that all three presences are satisfied during every will execution ceremony.

1. Testator Signs in Witnesses' Presence

Good practice mandates that the testator sign the will in the presence of the witnesses. However, many states do not impose this requirement. The testator may simply acknowledge the testator's signature to the witnesses. See U.P.C. § 2-502(a)(3). This acknowledgment can be by express words such as, "This is my signature" or "I signed this already," or by some gesture that carries the appropriate message, for example, pointing to the signature, nodding, and giving a thumbs-up sign.

2. Witnesses Attest in Testator's Presence

Consistent with the Statute of Frauds requirement dating from 1676, the vast majority of states require the witnesses to attest in the presence of the testator. This requirement helps ensure that the witnesses attest the testator's actual will and not some other instrument that was either accidentally or intentionally substituted. A few jurisdictions, however, have followed the lead of U.P.C. § 2-502(a) by eliminating this requirement. In these states, it is possible for the witnesses to attest even after the testator has died as long as the attestation occurs within a reasonable time after the testator signed the will or acknowledged the will or the signature to the witnesses.

The testator does not actually need to see the witnesses attest. Compliance with such a requirement would be extremely difficult to prove and would prevent visually impaired individuals from executing wills. The most widely accepted approach is *conscious presence.* Under this rule, an attestation is proper if the testator was able to see it from the testator's actual position or from a slightly altered position if the testator has the power to make the alteration without assistance. A few states adopt a relatively tough *line of sight* rule meaning that the testator needs to have been in a position where the testator could have seen the attestation if the testator were looking.

3. Witnesses Attesting in Each Other's Presence

The 1837 Wills Act required the witnesses to be present at the same time when the testator signed or acknowledged the will. Although some states have retained this requirement, most states do not require the witnesses to be together either (1) when the testator signs or acknowledges the will, or (2) when the witnesses attest to the will.

F. Interested Witnesses

An interested witness is a witness who stands to benefit if the testator's will is valid. The most common type of interest is being a beneficiary under the will. The testimony of an interested witness about the attestation is suspect because the witness has a motive to lie. The potential ramifications of having an interested person serve as a necessary witness to the will vary significantly among the states.

- The entire will is void. This was the original common law rule unless there was a supernumerary (extra) witness to validate the will. The witness/beneficiary was deemed totally incompetent to testify about the will because the witness lacked competency at the time of the witnessing.
- The gift to the witness is void. The witness forfeits any benefit under the will and is thus made disinterested and capable of giving testimony about the

will. A statutory provision providing this result is often called a *purging* statute.

- The gift to the witness is void unless the witness is also an heir, in which case the witness can receive the gift provided it does not exceed the share of the testator's estate the witness would take under intestate succession. With regard to the smaller of the gift under the will or the intestate share, the witness has no motive to lie because the witness will receive that amount regardless of the validity of the will.
- The gift to the witness is void unless a disinterested person (either another witness or a third party who was present) can corroborate the testimony of the witness.
- The gift to the witness is presumed to be the result of fraud or undue influence. However, the witness may bring forth evidence to rebut this presumption and, if successful, take under the will.
- No effect, and thus the beneficiary takes the property exactly as the testator specified in the will. This is the approach adopted by U.P.C. § 2-505(b).

G. Self-Proving Affidavit

The requirements for a self-proving affidavit vary among the states. Some states have savings statutes, similar to those for the will itself, so that an out-of-compliance affidavit will be effective if it was valid under the law of the testator's domicile at the time of will execution or where the testator executed the will.

IV. CHANGED CIRCUMSTANCES AFTER WILL EXECUTION -- PROPERTY

The property of a testator is not frozen when the testator executes a will. The composition and value of the estate are in constant flux. Likewise, the identity of the individuals whom the testator wishes to benefit may change due to births, adoptions, deaths, marriages, and divorces. All these changes in circumstance can have a profound effect on the testator's intent, an existing will, and the distribution of property upon death both under the will and due to the application of legal rules.

States have developed a sophisticated set of rules to deal with changed circumstances. The general approach is for the legislature or the courts to create relatively rigid presumptions based on what they believe testators, in general, would have wanted had the testators thought about these issues. Courts then apply the presumptions to determine the appropriate distribution of property. Some of these rules are relatively uniform among the states while others are 180 degrees apart.

To avoid the application of these presumptions, a testator should include express provisions in the will dealing with each of these issues. A testator who provides specific instructions for how to handle circumstance changes empowers the court to carry out the testator's actual intention, rather than a presumed intent as determined by statutory or case law.

In this section, changes that occur to the testator's property are discussed and the next section focuses on changes that happen to beneficiaries and family members.

A. Ademption by Extinction

Ademption refers to the failure of a specific gift because the property is not in the testator's estate when the testator dies. The asset could have been sold, given away, consumed, stolen, or destroyed.

Most jurisdictions apply a very rigid rule, often called the *identity theory* or *Lord Thurlow's Rule.* If the exact item the testator attempted to give away in the will is not in the testator's estate, the gift adeems and the beneficiary receives nothing. No evidence that the testator intended ademption to occur is required. Likewise, the beneficiary does not receive the value of the attempted gift, may not demand that the executor obtain the item for the beneficiary, and cannot trace into the proceeds of the asset.

A minority of states have departed from the traditional rule to avoid the harsh results that sometimes occur under the identity rule. These

jurisdictions have adopted rules that attempt to preserve specific gifts under a variety of circumstances. *Intent view* jurisdictions may allow tracing and may even permit the beneficiary to receive the value of the missing property. See U.P.C. § 2-606, which imposes a presumption that the testator did not want the gift to adeem and provides alternate gifts under a wide variety of circumstances.

To avoid ademption problems and to make certain the courts follow the testator's wishes, each specific gift should contain an express statement of the testator's intent should the gifted property not be in the estate. The testator should either (1) provide a substitute gift (e.g., another specific gift or a sum of money), or (2) state that the beneficiary receives nothing if the exact item is not part of the estate.

B. Adaption by Satisfaction

Satisfaction is the failure of a testamentary gift because the testator has already transferred the property to the beneficiary between the time of will execution and time of death. At common law, the doctrine applied only to gifts of personal property while the modern trend is to permit gifts of real property to be satisfied as well. Common law courts applied the doctrine of *ejusdem generis.* Under this doctrine, the character of the testamentary gift and the inter vivos gift had to be the same before satisfaction took place (e.g., the same item). However, some modern statutes reject this doctrine and testamentary gifts may be satisfied by a wide variety of inter vivos transfers even if the gifts are of very different types of property.

Courts must determine whether the testator intended an inter vivos transfer to cause the satisfaction of a testamentary gift. Common law courts applied a rebuttable presumption in this endeavor. Satisfaction had to be proven unless the beneficiary was the testator's child, or someone over whom the testator was in the position of a parent, in which case satisfaction was presumed. Most states no longer follow this presumption and instead require that extrinsic evidence proves that the testator intended for the inter vivos gift to be a satisfaction in all cases.

The modern trend is to restrict the types of evidence that may be used to prove a satisfaction. For example, U.P.C. § 2-609 requires either (a) a writing signed by the testator or the beneficiary declaring the gift to be a satisfaction, or (b) express directions in the will providing for the deduction of inter vivos gifts from testamentary ones.

To avoid confusion, wills should contain express language addressing satisfaction issues.

C. Changes in Value to Corporate Securities

Gifts of corporate securities are commonly the subject of dispute because of the tremendous variety of changes that may occur to them between will execution and death. If the change is merely one of form, the beneficiary stands a good chance of taking the securities resulting from the change (e.g., a stock split, stock dividend, or shares resulting from a merger or reorganization). However, if the change is one of substance (e.g., a cash dividend or shares acquired via a dividend reinvestment plan), the beneficiary will usually not benefit from the newly-acquired securities. Many states codify the applicable rules. See U.P.C. § 2-605.

To avoid uncertainty, these issues should be covered in wills that make gifts of corporate securities.

D. Interest on Legacies

Interest, if any, earned by a legacy prior to the testator's death does not pass to the legatee as it is not part of the money that the testator is actually giving. At common law, unpaid legacies began to earn interest starting one year after the testator's death. Many modern statutes, such as U.P.C. § 3-904, change this rule and delay the running of interest by providing that interest does not begin to accrue until one year after the appointment of a personal representative. The rate of this interest is typically the judgment or legal rate in effect in that jurisdiction.

Accordingly, wills containing legacies should state when and if interest begins accruing and at what rate.

E. Exoneration

Specifically devised or bequeathed property is often subject to encumbrances. Real property may be burdened by a mortgage or deed of trust, and the testator may have used personal property as collateral under a security agreement governed by Article 9 of the Uniform Commercial Code. Does the beneficiary of encumbered specific gifts take them free from the liens or does the beneficiary take subject to the liens receiving only the testator's equity in the property?

At common law, exoneration was presumed. A testator presumably would not have wanted to burden the recipient of a gift with a debt and thus there was, in effect, an implied gift of sufficient money to pay off the debt. Because of the potential of exoneration causing tremendous disruption of the testator's intent, many states and U.P.C. § 2-607 reverse the common law presumption by providing that exoneration occurs only if there is express language requiring it in the will.

Prudent practice is for the testator to address the potential for exoneration each time a gift of encumbered (or potentially encumbered) property is made.

F. Abatement

A testator may attempt to give away more property in the testator's will than the testator is actually able to give. This could occur because the testator misjudged the value of the testator's estate. Just because a testator leaves a $500,000 legacy in the testator's will does not mean the testator actually has that money to give. The testator may also not have accounted for all of the testator's debts, including funeral and burial costs and expenses of last illness. In most situations, the claims of creditors have priority over assertions to property by beneficiaries.

Abatement is the reduction or elimination of a testamentary gift to pay an obligation of the estate or a testamentary gift of a higher priority. Most states, either by judicial decision or through legislation, have established an abatement order. The usual abatement order is set forth below:

1. Property passing via intestate succession (that is, the testator died partially intestate).
2. Residuary gifts.
3. General gifts.
4. Demonstrative gifts.
5. Specific gifts.

Consequently, a beneficiary of a specific gift stands a much greater chance of actually receiving the gift than a residuary beneficiary. Some jurisdictions retain the common law rule of requiring personal property in each category to be exhausted before real property from that category may be used. Other states no longer make a distinction between real and personal property. See U.P.C. § 3-902. Within a category, abatement is pro rata so that each gift is reduced by the same percentage. A few jurisdictions give certain types of gifts top priority; that is, they are the last to abate, regardless of the classification of the gift. The most common gift given this super-priority is a gift to a spouse.

A testator may wish to provide an express abatement order to make certain the testator's true intent is followed.

V. CHANGED CIRCUMSTANCES AFTER WILL EXECUTION – PEOPLE

A. Marriage

At common law, the mere fact that a male testator got married after executing his will had no effect on the disposition of property under his premarriage will unless a child was born to the marriage. However, the marriage did give rise to the wife's dower rights, that is, a life estate in one-third of all real property that her husband owned at any time during the marriage.

On the other hand, the valid will of a single woman was revoked upon her marriage at common law. This automatic revocation was based on the common law view that marriage removed a woman's legal capacity to execute a will or revoke a previously existing will. Because the wife could not revise her will to take her new

family into account, the courts thought it inappropriate to force the wife to stick with the terms of the premarriage will and thus deemed her will revoked upon her marriage.

1. Common Law Marital Property Jurisdictions

Under modern law, the effect of marriage on a will written before marriage no longer depends on the gender of the testator. While the laws of a few states deem a premarriage will totally ineffective upon marriage causing the deceased spouse's entire probate estate to pass under intestacy, most states revoke only a portion of the will, and then only if the will does not provide the surviving spouse with a sufficient amount of property. To protect a surviving spouse from being disinherited or receiving a relatively small share of the deceased spouse's estate, the surviving spouse is given the right to a *forced* or *elective* share of the deceased spouse's estate. This share is in lieu of the benefits, if any, provided to the surviving spouse in the deceased spouse's will. The surviving spouse is entitled to this statutory amount regardless of the deceased spouse's intent as documented in the will.

The method used to compute the surviving spouse's forced share varies tremendously among the states and thus must be considered when drafting a will. Below are some commonly used schemes.

1. A fixed percentage of the net probate estate, e.g., one-third.
2. Fixed percentages of the net probate estate depending on the number of children, with the surviving spouse receiving a smaller percentage if the deceased spouse had children, e.g., one-half if no children, one-third if children.
3. A minimum dollar amount plus a fixed percentage of any additional property in the net probate estate, e.g., the first $100,000 plus one-third of any excess.
4. Variable percentages depending on the length of the marriage, e.g., U.P.C. § 2-202, which begins at 3 percent for a marriage lasting one to two years and increases to 50 percent for marriages of fifteen or more years.

Many statutes apply the elective share formula on an *augmented estate,* rather than the net probate estate. See U.P.C. § § 2-201 through 2-214. The augmented estate may contain the value of nonprobate assets such as the deceased spouse's share of jointly held property passing because of rights of survivorship and life insurance proceeds that are not payable to the surviving spouse. Under the law of a few states, even some property the deceased spouse gave away while alive is treated as part of the augmented estate when computing the forced share. The augmented estate concept prevents the deceased spouse from reducing the surviving spouse's elective share by using probate avoidance techniques to dispose of the property. If the surviving spouse received the benefit of a nonprobate transfer, however, some statutes require these amounts to offset the forced share.

2. Community Property Marital Property Jurisdictions

Under the law of community property states such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, spouses own undivided interests in the property they acquire from earnings during marriage. Thus, the marriage of a testator typically has no impact on the property disposition provided for in a premarriage will. The surviving spouse does not need a forced share to be protected from disinheritance because the surviving spouse already owns one-half of the community property; the deceased spouse's will may not dispose of the surviving spouse's share of the community without the survivor's consent.

3. Change in Domicile

The general rule in the United States is that the ownership of earnings between spouses is governed by the law of the spouse's domicile at the time the property was acquired. Marital rights in property do not change as the couple moves from one type of marital property state to another.

B. Divorce

Divorce was not a common occurrence in the early history of England or the United States.

Thus, there is little common law addressing the ramifications of a divorce on a will executed during marriage that made a gift to a person who is now an ex-spouse. Early decisions usually held that the divorce had no effect on the will. The courts realized that a testator probably did not intend for the property to pass to an ex-spouse but felt that they had no legal basis for voiding the gift.

Most states now have statutes providing that upon divorce, all provisions of a will executed during marriage in favor of an ex-spouse are void. The balance of the will remains effective as written. See U.P.C. § 2-804. Thus, the ex-spouse would not be able to take as a beneficiary or serve in a fiduciary capacity such as the executor of the will, the guardian of any minor children, or the trustee of a testamentary trust. If the spouses remarry each other and remain married until the first spouse dies, the will typically remains effective as originally written. Some states also permit a will to include a provision validating a gift in favor of a spouse regardless of whether the spouses are married or divorced at the time of the testator's death.

States vary regarding whether gifts to other ex-relatives like a former step-child are also automatically voided upon divorce. In addition, the voiding provisions typically apply only upon a final divorce.

Accordingly, the will should directly address what happens if a divorce action is pending at the time of death and the result if the divorce is final.

C. Pretermitted Heirs

Parents normally have no obligation to provide testamentary gifts for their children, even if they are minors, under the law of common law jurisdictions. Thus, a parent may intentionally disinherit one or more of the parent's children. To protect a child from an accidental or inadvertent disinheritance, state legislatures have enacted statutes that may provide a forced share of the parent's estate for a pretermitted (omitted) child under certain circumstances.

Under the law of most states, a child must be born or adopted after the testator executed the will to receive a forced share as a pretermitted child. See U.P.C. § 2-302. In a few states, however, even an omitted child who was born before the parent executed the will can claim a forced share.

Jurisdictions use a variety of methods to determine the share of a pretermitted child. Traditionally, the pretermitted child receives the share the child would have received if the testator had died intestate. Some states still follow the common law view that if a testator executes a will and then marries and has a child, the entire will is revoked so that the testator's entire estate passes by intestacy. Modern statutes are not so extreme and often do not base the pretermitted child's share on the size of the testator's probate estate. For example, some states give the pretermitted child an intestate share only of the property that does not pass to the child's other parent. If the testator's will leaves property to some of the testator's children, some states limit the pretermitted child to an intestate share based solely on gifts made to these children. This restriction prevents the pretermitted child from receiving a larger share of the estate than the children, as a class, who were actually provided for in the will.

Accordingly, a testator should expressly indicate how all children, born, unborn, and to be adopted, are to be handled.

D. Lapse

Lapse occurs when a gift fails because the beneficiary predeceases the testator, either biologically or legally such as properly disclaiming or dying within the survival period. Unless the anti-lapse statute applies, the subject matter of the gift will then pass under the will's residuary clause, or, if the lapsed gift was the residuary, via intestacy.

Anti-lapse statutes prevent lapse by providing substitute beneficiaries for the lapsed gift. The goal of these statutes is to provide a distribution that the testator would have preferred over the property passing under the residuary clause or via intestacy. These statutes operate on the presumption that if the testator had anticipated that the beneficiary would die first, the testator would have supplied an alternate gift to the descendants of the predeceased beneficiary who

survive the testator. The manner of distribution among these descendants may be per stirpes, per capita with representation, or per capita at each generation depending on the jurisdiction.

Anti-lapse statutes vary among the states. Some statutes are narrow and save gifts made to only a limited number of the testator's predeceased relatives such as descendants (children, grandchildren, etc.) or descendants of the testator's parents (brothers, sisters, nieces, nephews, etc.). Other anti-lapse statutes are broader. For example, U.P.C. § 2-603 saves gifts made to grandparents or descendants of grandparents (aunts, uncles, cousins, siblings, nieces, nephews, etc.). A few states have wide-sweeping anti-lapse statutes that save lapsed gifts in all cases where the predeceased beneficiary left descendants who survived the testator, even if there is no familial relationship between the testator and the beneficiary.

Most states apply anti-lapse statutes to class gifts, as well as to gifts to individuals. Thus, if a will provides, "I leave all my property to my children," the children of any predeceased child will take the predeceased child's share. However, if the predeceased child died before the testator executed the will, many states would not permit this predeceased child's descendants to take because the class never included the predeceased child.

To prevent the result of lapse from being governed by rules that may not comport with the testator's intent, each gift should expressly indicate who receives the property in the event of lapse. For example, the testator could make an express gift over to a contingent beneficiary, indicate that the gift passes to the descendants of a deceased beneficiary, or merely state that the gift passes via the residuary clause.

E. Survival

At common law and under the 1953 version of the Uniform Simultaneous Death Act, a beneficiary needed to outlive the testator for only a mere instant to take under the will. This rule often caused litigation over who survived whom when the deaths of the testator and beneficiary occurred close together in an automobile accident, airplane crash, tornado, or other unfortunate event.

Most jurisdictions now impose a survival period by statute. Thus, a beneficiary must not only outlive the testator, but must also outlive by the statutorily specified period of time. Under the 1991 version of the Uniform Simultaneous Death Act and U.P.C. § 2-702, the beneficiary must survive by at least 120 hours (five days). If the beneficiary survives the testator but dies prior to the expiration of the survival period, the gift passes as if the beneficiary had actually died prior to the testator.

Testators may lengthen or shorten the survival period by express provision in the will. States vary regarding whether the use of the phrase "if she survives me" reduces the survival period to a mere instant or functions only as a restatement of the statutory rule. Some statutes provide that any mention of survival trumps the survival statute while others require the testator to provide an express survival period to supplant the statutory period.

Most testators will want to increase the survival time period as the property could never reach the hands of a beneficiary within a mere five days. Thus, the will should contain an express statement of a longer time period.

VI. INTERPRETATON AND CONSTRUCTION

A. No Apparent Ambiguity

A no apparent ambiguity situation arises when the will provision is neither latently nor patently ambiguous but yet someone wants to introduce extrinsic evidence that the testator did not mean for the will to say what it appears to say. Jurisdictions are sharply divided on this issue.

Traditionally, courts follow the *plain meaning rule,* also called the *single plain meaning rule.* Under this approach, extrinsic evidence cannot be used to disturb the clear meaning of the will. This rule enhances predictability for both the testator and the testator's attorney. A testator can rest assured that the words chosen will take effect as written. Otherwise, the testator could make a

gift of "$10,000 to Mother" and then have Mother claim that the gift should be of some higher amount such as $100,000 and Father claim that the legacy was actually meant for him.

Other jurisdictions adopt a more liberal rule that permits the use of extrinsic evidence. These courts hold that the evidence is significant and assists the court to carry out the testator's intent. Although this approach makes it more difficult for the testator to be certain that the will is not tampered with or misconstrued after the testator's death, it operates to carry out the testator's intent when it is clear the will does not say what the testator meant it to say. Courts do keep a tight rein on these situations and generally allow the extrinsic evidence to alter the will's clear meaning only when the will was not professionally prepared and the evidence is very strong (e.g., clear and convincing rather than a preponderance) that carrying out the exact terms of the will would frustrate the testator's intent.

In 2008, § 2-805 was added to the Uniform Probate Code which allows for reformation to correct mistakes even if the will is unambiguous. This section allows the court to reform the terms of an instrument, if it can be shown by clear and convincing evidence that transferor's intent and the terms of the instrument were affected by a mistake of fact or law either in expression or in inducement.

The will drafter must appreciate how the difference in the applicable rules could impact how people may attempt to "alter" the gifts the testator makes in the will.

B. Class Gift Membership

The types of individuals entitled to qualify as class members is an often litigated issue. Assume that a gift is made to your "children." Does this gift include individuals you adopt while they are minors, individuals you adopt after they become adults, or children born outside of a marriage? What if the gift was made instead to your "issue" or to your "bodily heirs"?

Historically, courts presumed that a testator intended to include adopted individuals in a class gift to the testator's own children. However, if the class gift was to someone else's children, courts typically followed the *stranger-to-the-adoption rule,* which created a presumption that the testator did not intend to include the adopted individuals. These presumptions could be rebutted by evidence of the testator's intent to the contrary. For example, the testator may have known that the other person could not have biological children and the testator may have had a close relationship with that person's adopted children.

Modern courts and statutes have been very inclusive in determining class membership. For example, U.P.C. § 2-705(b) provides that adopted individuals, persons born outside of the marriage, children born by assisted reproduction, and gestational children are generally included in a class gift. However, under U.P.C. § 2-705(e) and (f), adopted individuals and persons born outside of the marriage usually need to have been treated as a child before the child reached eighteen years of age for the child to be included in the class gift.

States vary significantly on how to handle children born as the result of alternative reproductive techniques. Some do not address the issue, some provide that the person must be born within a fixed time period after death such as two or three years, while others require that the child be in utero at the time of death.

To resolve class gift issues, the testator should carefully explain the categories of individuals the testator wishes to encompass within a class gift. For example, a class gift to children should address adopted-in minors, adopted-in adults, adopted-out individuals, children born out of wedlock, and children born via alternative reproduction techniques. Courts are extremely willing to follow the testator's intent as expressed in the will even if that intent is contrary to normal construction rules.

C. Incorporation by Reference

Incorporation by reference is a method for treating a document as testamentary in character even though that document is not physically part of the testator's will. If the testator successfully incorporates a document by reference into the will, the will is treated as if the terms of the incorporated document are actually contained in

the will. Although the incorporated document is not really part of the will, this doctrine creates the legal fiction that the will contains an exact copy of the incorporated document. Although practically all states and U.P.C. § 2-510 recognize the doctrine of incorporation by reference, some do not and thus prudent practice may be to avoid using this technique.

D. Tangible Personal Property Document

A limited number of states and U.P.C. § 2-513 authorize a testator to use a separate writing to dispose of tangible personal property even though that writing (a) does not meet the requirements of a will and thus could not be probated as a testamentary instrument, (b) was not in existence at the date of will execution and thus could not be incorporated by reference, and (c) exists for no reason other than to dispose of property at death and thus could not be a fact of independent significance.

The testator must comply with some relatively easy requirements to use this technique. Generally, the will must expressly refer to the list, the testator must sign the list, and the list must describe the items and the recipients with reasonable certainty. The type of property the testator can dispose of with this instrument is usually limited to tangible personal property that is not already specifically gifted in the will. Thus, the list could not be used to make cash legacies, bequests of corporate securities, or devises of real property. The list may be prepared before or after the testator executes the will and the testator may alter the list at any time.

Proponents of this technique recognize that it is a tremendous departure from established law. However, they believe that the risks of fraud and misuse are counterbalanced by the potential of enhancing the law's ability to assist the testator in accomplishing the testator's desires. This technique permits the testator to control the disposition of a portion of the testator's estate without having to endure the expense and inconvenience of (1) initially providing a lengthy list of specific gifts to the drafting attorney, and (2) later needing to execute a codicil or new will to make changes to that list. In addition, these gifts are usually not of great monetary value. Instead, the gifts are of jewelry, photograph albums, videorecordings, books, furniture, and other items the testator wants to transfer primarily for sentimental or emotional reasons.

If the testator moves from a state recognizing this technique to one that does not, it is possible that the tangible personal property document will have no effect. Thus, this technique must be used with great care.

E. Election Wills in Community Property Jurisdictions

"The principal of election is, that he who accepts a benefit under a will, must adopt the whole contents of the instrument, so far as it concerns him; conforming to its provisions, and renouncing every right inconsistent with it."[6] Election provisions are occasionally placed in wills where one spouse wants to dispose of the entire interest in some or all of the community property. The surviving spouse may consent to the disposition of the surviving spouse's share of the community assets because the will gives the spouse a significant interest in the deceased spouse's community or separate property.

Attorneys must be careful, however, not to inadvertently create an election situation. Although there is a normally a presumption that an election will be imposed only if the will is open to no other construction, an attorney could create an election scenario without having this intention.[7] Thus, the will should include a provision expressly stating the testator's intent regarding election.

VII. ESTATE ADMINISTRATION

A. Authorizing State-Specific Methods

Many states have specialized types of administration which the testator must authorize in the will. It is difficult to anticipate what language is needed without knowing the exact state in which the administration will occur.

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[6] Philleo v. Holliday, 24 Tex. 38, 45 (1859).

[7] Wright v. Wright, 154 Tex. 138, 143; 274 S.W.2d 670, 674 (1955).

B. Bond

The personal representative may need to post bond conditioned on the faithful performance of the representative's duties. The court sets the amount of the bond based on the value of the decedent's estate. The personal representative may deliver that amount in cash to the court; however, the personal representative typically obtains the bond from a surety company. In exchange for the payment of premiums, the surety company agrees to pay the amount of the bond to the creditors and beneficiaries if the personal representative breaches the applicable fiduciary duties. Of course, if the surety is required to pay, the surety will seek reimbursement from the personal representative.

States are divided on the bonding requirement. Some state statutes require a bond unless the will expressly waives the bond. On the other hand, some statutes do not require a bond unless the testator expressly requires it in the will or the court deems it necessary. See U.P.C. § 3-603. In addition, some states exempt corporate fiduciaries from the bonding requirement.

To be certain the testator's intent is effectuated, the will should expressly state whether the executor must post bond.

C. Compensation

The default method of executor compensation varies significantly among the states. Some provide the executor with reasonable compensation while others have formulas ranging from the simple to the complex.

To avoid compensation issues, the testator should expressly explain how the executor's compensation should be computed.

D. Payment of "Just Debts" Provision

The traditional, but inappropriate, direction to the executor to pay "just debts" should not be included in a will. A specific will clause requiring that the executor pay all of the testator's "just debts" raises the question whether the executor is required to pay debts barred by limitations, and whether the executor is required to pay installments on long-term indebtedness that are not yet due.[8]

[8] Bernard E. Jones, *10 Drafting Mistakes You Don't Want to Make in Wills and Trusts (and How to Avoid Them)*, in UNIVERSITY OF TEXAS SCHOOL OF LAW CLE, 8TH ANNUAL ESTATE PLANNING, GUARDIANSHIP, AND ELDER LAW CONFERENCE, Tab B, at 5 (2006).